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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1014.

REVEREND GEORGE BURDIKOFF, STEPHAN LOBODA, HARRY YAVORNITZKY, MICHAEL YUHAS AND ANDREW PATRICK,

Petitioners,

vs.

THE RUSSIAN ORTHODOX GREEK CATHOLIC ST. PETER AND ST. PAUL'S CHURCH OF LORAIN, OHIO, GREGORY SANDOR, MIKE HRUBIC, MIKE CHEMEROV, MIKE KAWOLCHYK, as individuals and officers of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals, Lorain County, Ohio, Ninth Judicial District of Ohio.

JOHN R. VINTILLA,
Hanna Bldg.,
Cleveland, Ohio,
Attorney for Petitioners.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BY COURTS BELOW.

The petitioners, Reverend George Burdikoff, Stephan Loboda, Harry Yavornitzsky, Michael Yuhas, Andrew Patrick, respectfully pray for a Writ of Certiorari to the Court of Appeals for Lorain County, Ohio, Ninth Judicial District of Ohio, to review the judgment and decision of said Court in case No. 1558, entitled Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain,

Ohio, et al., vs. Reverend George Burdikoff, et al. The decision of the Court of Appeals was rendered on July 25, 1962, the opinion of which is appended hereto as Appendix A. The judgment journal entry of said Court of Appeals is appended hereto as Appendix B. The Court of Appeals in a trial de novo on the same testimony and exhibits presented to the trial court, entered a judgment in favor of the respondents directing the ejectment and ouster of petitioner, Reverend George Burdikoff, from the parish house and church of St. Peter and St. Paul's Russian Orthodox Greek Catholic Church of Lorain, Ohio, and permanently enjoining the other petitioners from acting as officers of said church. The Court of Appeals entered the same decree as that rendered by the trial court, the Court of Common Pleas of Lorain County, Ohio, being case number 65889 therein. Appendix C, Opinion of trial judge, Appendix D, Journal Entry of Common Pleas Court of Lorain County, Ohio. The judgment of the Court of Appeals which, in effect, affirmed the judgment of the Court of Common Pleas in favor of the respondents, was based upon the legal proposition that the Patriarch of Moscow had somehow lost jurisdiction of the Lorain parish of the Russian Orthodox Church by virtue of the formation of a separate church body of the Russian Orthodox Church in America sometime in 1924, and known thereafter as the Metropolia, and that since said time "the spiritual jurisdiction of the Church of St. Peter and Paul of Lorain, Ohio, is within the Metropolia."

Petitioners thereupon sought a review of the decision by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court for review, and as an appeal of right on the ground that the decision of the Court of Appeals violated their constitutional rights of religious freedom as

secured to them by the First and Fourteenth Amendments to the Constitution of the United States. The right to a review by the Ohio Supreme Court is dependent upon the discretion of the court in determining that the case is one of public or great general interest, or that a debatable constitutional question is involved. The review sought by the petitioners on motion to certify and as an appeal on constitutional questions was denied by the Supreme Court of Ohio. An application for rehearing was addressed to the Court by the petitioners which was also denied, Appendix E. The relevant orders of the Ohio Supreme Court are appended as Appendix F herewith.

Pursuant to Ohio law, therefore, the decision of the Court of Appeals for Lorain County, Ohio, Ninth Judicial District of Ohio, becomes the judgment of the highest court of the state in which a decision could be had.

JURISDICTION.

This Court's jurisdiction is invoked under Section 1257 (3) of Title 28, United States Code. The orders of the Supreme Court of Ohio refusing to review the decision of the Court of Appeals for Lorain County, Ohio, were rendered on December 19, 1962. A timely application for rehearing by the petitioners of these orders in that court was denied on January 16, 1963.

QUESTIONS PRESENTED.

1. Does the decision of the Court of Appeals reported in 117 Ohio Appellate 1, deprive petitioners of their legal rights without due process of law and deny them the equal protection of the laws in contravention of the Fourteenth Amendment?

2. Does the judgment of the Court of Appeals directing the ouster from St. Peter and St. Paul's Russian Ortho-

dox Church of Lorain, Ohio, of the priest designated and confirmed as the pastor of said church by the appointee and representative in the United States of the Patriarch of Moscow, and permanently enjoining said priest, the petitioner, Reverend George Burdikoff, from asserting his rights and prerogatives as the pastor of said church, deprive said petitioner of his legal rights to "freedom of religion" in violation of the First Amendment to the Constitution of the United States?

3. May the respondents in the instant cause impeach the records of this Court, including its judgments, in *Kedroff vs. St. Nicholas Cathedral*, 344 U. S. 94, and *Kreshik vs. St. Nicholas Cathedral*, 363 U. S. 190, and do such records, as judgments, have a further effect of precluding a re-examination into the truth of the matters decided therein?

4. Is the decision of the Court of Appeals in contravention of (a) the decision of this Court reported in 344 U. S. 94, (b) *Kreshik vs. St. Nicholas Cathedral*, 363 U. S. 190, (c) *Watson v. Jones* (13 Wall. 679) and (d) the guarantees of religious liberty of the First and Fourteenth Amendments to the United States Constitution?

THE MANNER IN WHICH THE FEDERAL QUESTIONS ARE RAISED.

The federal questions in this case were asserted in the joint answer of the petitioners which alleged by way of affirmative defenses that the relief sought by respondents and the ouster from the Lorain, Ohio parish of the Russian Orthodox Church of petitioners would contravene the decisions of this Court in 344 U. S. 94 and 363 U. S. 190, Appendix G. These defenses were asserted in support of petitioners' Motion for Summary Judgment and Affi-

davit, Appendix H, and reiterated in support of petitioners' motion to dismiss the amended petition at the end of respondents case, and were advanced in the petitioners' briefs in the Court of Appeals and the Supreme Court of Ohio and on the oral arguments by their counsel before these courts.

THE CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution. Their text is given in Appendix I attached hereto.

STATEMENT OF THE CASE.

The respondents, on or about the 16th day of December, 1960, filed their petition in the Common Pleas Court of Lorain County, Ohio for injunction and equitable relief, Appendix J. In essence, the petition states that petitioner, Reverend George Burdikoff, who is and has been pastor of the parish in question since July, 1955, is without authority to officiate and to perform the duties and functions of a priest of the Lorain, Ohio, parish of the Russian Orthodox Greek Catholic Church because he has been suspended by an alleged Archbishop John and the Council of Bishops headed by an alleged Metropolitan Leonty, who is alleged to be the ruling hierarch of the Russian Orthodox Church of America, and, that by reason thereof, the other petitioners, as acting officers of the parish, are without authority to employ Reverend Burdikoff as a priest of said parish and to use and occupy the Church property. The respondents then pray that the petitioner, Reverend George Burdikoff, be enjoined preliminarily and in final hearing permanently, from serving as a priest or rector of the Russian Orthodox

Church of Lorain, Ohio, and from occupying said church building or other church property, and that the other petitioners, as officers of said church, be enjoined preliminarily forthwith from permitting the said priest to officiate, in the said church and, along with others be enjoined from using or occupying any and all church property. Solely upon the allegations in respondents' petition, as aforesaid, the Common Pleas Court granted the temporary injunction as prayed for without notice to the petitioners and an opportunity for them to be heard prior to the issuance of said order. Immediately upon being served with a copy of the petition and the temporary injunction the petitioners filed a motion to dissolve, vacate and set aside said injunction, together with an affidavit attached thereto (Appendix K) challenging the allegations in said petition, and a brief in support thereof. After receiving a counter affidavit from the respondents, the court on December 27, 1960, overruled petitioners' motion to dissolve the temporary injunction. Inasmuch as the trial court's order which restrained Reverend Burdikoff from officiating and performing the functions of the priest of the church in question, interfered with the petitioner's right of religious worship at the most crucial and important time of the year for said priest and the adherents of the church, namely—the Christmas season which is celebrated on January 7th —an appeal therefrom was taken at once to the Court of Appeals with an accompanying motion requesting an urgent hearing thereof. Since an immediate hearing before January 7th was not granted by the appellate court, another attempt was made in the trial court to correct the injustice by means of a motion to rehear and reconsider the earlier motion to dissolve and vacate the temporary injunction. This motion was filed by the petitioners, on January 9, 1961, and denied by the trial court on March

13, 1961. As a result thereof, petitioners filed their appeal to the Court of Appeals seeking a review of the orders of the trial court denying the motion to rehear and reconsider, overruling the motion to dissolve and vacate the temporary restraining order, and in granting the temporary restraining order without notice and hearing. A motion to dismiss this appeal was filed by the respondents on the ground that there was no final appealable order before the court which was sustained by the appellate court and the appeal thereby dismissed. A further appeal therefrom to the Supreme Court of Ohio was denied, 172 Ohio St. 440; 186 N. E. 2d 847.

In the meantime, the respondents filed an amended petition, pursuant to court order, which, in substance, contains the same allegations as the original petition.

STATEMENT OF FACTS.

Origin of Lorain Church.

Originally, the Russian Orthodox Church in America was a missionary church which had its inception in Alaska at the end of the 18th century and later spread down the Pacific coast of this country. By 1917-1918, the Russian Orthodox Church in America became a well-organized archdiocese of the Russian Orthodox Church in Russia with many parishes throughout the North American continent (Tr. 5, 6, 42, 636, 637). The history of the St. Peter and Paul Parish of the Russian Orthodox Church in Lorain commences with the year 1912. Upon incorporation of the parish in 1920, the charter reveals that it was organized "to teach and promote the religion of Jesus Christ and the doctrine of the Russian Orthodox Greek Catholic Church" (Pl. Ex. 4). The founders of the Lorain parish organized the Church for the purpose of practicing

their faith as an integral part of the Russian Orthodox Church through its ruling bishop of the North American Diocese. Originally the title to the real property of the parish was taken in the name of the ruling bishop of the Russian Orthodox Greek Catholic Church of America, Bishop Alexander, who was the appointee of the Mother Church in Moscow (Tr. 623, 624). The rules and regulations of the Russian Orthodox Church in America "under whose jurisdiction the plaintiff corporation conducts its church rites and services," provide that title to all parish property must be taken in the name of the parish as a corporation, if the parish is so organized (Pl. Ex. 3, Tr. 640, 641). Subsequent to the incorporation of the church in 1920, a quiet title suit was filed by the Lorain parish. Said action was not instituted to and did not challenge the ecclesiastical authority of Bishop Alexander as the duly constituted appointee in North America of the Mother Church in Russia nor was it filed to change the religious affiliation of the church as originally founded, but conformed the ownership of the church property with the laws of the Diocese of the Russian Orthodox Church in North America with reference to the ownership and control of the parish church (Tr. 638, 639, 640, 641). From the date of its inception in 1920, to the present time, the Lorain parish functioned as a Russian Orthodox Church and its members worshipped and continue to worship in accordance with the faith and discipline of the Russian Orthodox Church as taught by the Holy Scriptures, Holy Tradition, the Seven Ecumenical Councils and the Holy Fathers (Tr. 441, 725).

The prevailing opinions in this Court, reported in 344 U. S. 94, and 363 U. S. 190, contain a factual summary of the nature and government of the Russian Orthodox Church, the history of the North American diocese, the

relationship between the American diocese and the church at large, the government of the diocese and the founding and activity of the Metropolitan District. The same factual basis forms a part of the record of the instant case. We believe, therefore, that it would be redundant to detail the same facts at this time. Moreover, we submit that the aforesaid factual basis, upon which this court premised its judgments in *Kedroff* and *Krêshik*, is equally undisputable and as effectively passed upon as the ultimate questions which said cases resolved.

The history and canons of the Russian Orthodox Church, to which the Court's attention has been directed, clearly reveal that the ultimate power and duty to rule the church was placed in the hands of the Patriarch and his Holy Synod; that the Grace of God descended from Jesus Christ to his Apostles and from them through the regularly consecrated bishops to those who now hold that holy office; that the Church is an indivisible whole composed of bishops, clergy and faithful, but that the administration and control of the Church is in the Patriarch and the Holy Synod, as the Supreme Authority of the Church; that representatives of the clergy and laity may meet in a general convention (Sobor), but that none of its enactments on ecclesiastical matters or those affecting the whole church are valid or effective until approved by the Patriarch of the Church. These facts are well established in the record of this case.

The Patriarch and Holy Synod constitute the supreme authority and tribunal of the Church upon matters of faith, discipine, general polity and tenets of the Church. Its decisions are binding on the civil courts. *Watson v. Jones*, 13 Wal. 679.

The lower court has cited no canon or law of this Church to support its decision that the supreme power

and jurisdiction over the American communicants and churches of the Russian Orthodox Church, as in the case of the Lorain Church, is in the Metropolitan District.

From the time of its founding the St. Peter and St. Paul's Church of Lorain, Ohio, has been a part of and has maintained its allegiance to the Mother Church in Russia and its Supreme Authority. It was established by a group of emigres from Russia who acknowledged the authority of the Mother Church. The association of the Lorain parish with the Metropolitan District was based upon the belief that Leonty and his predecessors in office also were a part of the Russian Orthodox Church and subordinate to the Supreme Authority of the Patriarch of Moscow The record herein is devoid of any evidence indicating that the Lorain Church severed its ties with the Mother Church, or that it aligned itself with any other group or body of the Russian Church which refused to abide by and/or to recognize the Primacy of the Patriarch of Moscow. The petitioners and their followers have remained in the Russian Orthodox Church, true to the discipline of the Mother Church, fully recognizing the Primacy of the the Patriarch of Moscow and the authority of the Holy Synod as the Supreme Authority of the Russian Orthodox Church.

The Archdiocese in North America is governed by a ruling Metropolitan appointed by the Supreme Authority of the Church, now the Patriarch of Moscow and all Russia and its Holy Synod (Tr. 623-633, 636, 672, 675) (Pl. Ex. R).

Metropolitan Leonty, who is alleged to be the present ruling hierarch of the Russian Orthodox Church in America was elected to that office by the adherents of the autonomous Metropolitan District. This election, how-

ever, was not approved or consented to by the Patriarch (Tr. 38, 39, 619, 633, 634). The alleged Metropolitan Leonty and Archbishop John to whom the individual respondents submit as their Superiors in the Church have defected from the Russian Orthodox Church and her Archdiocese in America by virtue of their affiliation with the Metropolitan District, a group which is considered schismatic by Church law. In view thereof, they are under suspension and interdict by his Holiness the Patriarch and the Holy Synod of the Russian Orthodox Church (Tr. 634, 675, 676, Pl. Ex. 28, Def. Ex. P).

The ruling Metropolitan of the Russian Orthodox Churches in America is Metropolitan Boris who is the accredited Archbishop of the American Archdiocese by virtue of his appointment to that office by the Patriarch of Moscow (Tr. 630, 631, Def. Ex. N), and that Dositheus Ivanchenko, his substitute, is the Bishop of New York and Acting Exarch, by like appointment (Tr. 631). Petitioner, Reverend George Burdikoff, is and has been acting as the pastor of the Lorain Church since June 21, 1960, by virtue of the authority vested in him by Bishop Dositheus, his immediate Superior (Def. Ex. X, Tr. 204, 205, 634, 743, 744, 789, 790, 791).

Petitioner, Reverend George Burdikoff, was ordained into the ministry on October 6, 1940, as a priest of the Russian Orthodox Church (Tr. 719) which had as its Supreme Authority the Patriarch of Moscow and All Russia (Tr. 720). Although petitioner Burdikoff, at times since his ordination as a Russian Orthodox Priest, had associated and aligned himself with different acting Russian Orthodox bishops, at no time did he or any parish which he served leave the Russian Orthodox Church, or knowingly take, ratify or acquiesce in any official action

whereby he or the particular parish which he served rejected and/or refused to acknowledge the primacy and jurisdiction of the Patriarch of Moscow as the Supreme Authority of the Russian Orthodox Church in America (Tr. 720, 721, 725, 726). Until 1955, the Leonty group, by its own admission, continued to follow and be governed by the 1917-1918 statutes adopted in Moscow for the government of the Archdiocese and parishes of the Russian Orthodox Church in North America (Tr. 41, 42, 636, 637, 638, 639, 640). More seriously, they acknowledge the authority of the fundamental law of the church, the canons, as being the same before and after their alleged separation in 1924 (Tr. 55, 56). As late as July of 1952, Metropolitan Leonty continued to acknowledge and affirm the fact that the Patriarch of Moscow and All Russia is the Supreme Authority of the Russian Orthodox Church in America. In an Archpastoral Epistle on said date (Def. Ex. R), Leonty addressed himself to his flock on this subject as follows:

"Official Section—July, 1952, No. 7

"Archpastoral epistle to Archpastors (bishops), Pastors, Choir Directors, Readers, Church parish trustees, leaders of Brotherhoods, Sisterhoods, Youth Club leaders, and School leaders, charitable organizations of our Russian Orthodox Church in North America—in the United States, Alaska and Canada.

'Rejoice in the Lord and again I say: rejoice.' Philip 4,4.

"Since my inauguration as head of the church we, the Hierarchs (bishops) and members of the Metropolitan Council, accepted and embraced, into our midst bishops and clergy, only those who were worthy, according to the teaching of the Founder of our faith, Our Lord Jesus Christ: He who comes to me I shall not cast out (John 6, 37). We also acted thoughtfully and

attentively in the canonical sense, so that in the first place 'that we should not contaminate ourselves by taint of pharisees, Saducees and Herod.' (Mathew 16, 6; Luke 12, 1; Mark 8, 15) and in the second place, that before the coming (future) Free Sobor of our Russian Church we will be able to give an honest account by preserving that which She, our Mother always adhered to, and to reject whatever She rejects and always rejected (Bishop's Oath). *Because of this we have adhered to the Canonical Truth in our Church by not recognizing consecration of the Ukrainian 'Independent' autocephalous groups and the Self consecrate, recognizing only those consecrations, which were recognized by the Patriarch of Moscow and All Russia.*" (Emphasis ours.)

The individual respondents, who profess to be Russian Orthodox Christians, unequivocally and emphatically deny the primacy of the Patriarch of Moscow and refuse to acknowledge and to abide by his authority and jurisdiction on ecclesiastical matters pertaining to the Lorain parish of which they claim to be members. They submit their religious allegiance to Leonty and do not recognize any other superior authority in the Russian Orthodox Church. They further refuse to acknowledge the petitioner, Reverend Burdikoff, as the duly constituted pastor of the Lorain parish by virtue of his appointment and confirmation as Rector thereof by Bishop Dositheus, the Acting Exarch and Ruling Bishop of the Russian Orthodox Church in the United States (Def. Ex. X).

The individual petitioners have been officers and/or active, devoted members of the Lorain Parish uninterruptedly for many years.

Numbers and exhibits as they appear in parenthesis refer to page numbers and exhibits in the typewritten transcript of testimony as it was submitted to the Court of Appeals and to the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT.

1. The decision below directly conflicts with the records and judgments of this Court in *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, and *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190.

Certain salient and material facts concerning the instant litigation are not in dispute. The Lorain church was formed and has existed ever since as a parish of a general ecclesiastical organization, the Russian Orthodox Church. The Russian Church is hierarchical in structure and government. The priest of the Lorain parish must have his appointment and/or be confirmed as the Rector of said church by the Ruling Hierarch of the Russian Orthodox Church in America. Acknowledgment and submission to church superiors is central to the theology of hierarchical churches of the Roman Catholic and Eastern Orthodox types. It is not the privilege of the laity or inferior clergy to question the legitimacy of the highest official.

The respondents admit and the lower court found, that until 1924 the Lorain Church was an integral part of the North American Diocese of the Russian Orthodox Church with the Patriarch of Moscow as the Supreme Authority of said church, but, conclude, however, that in April of said year a group of Russian Orthodox Churches, now known as the Metropolia, and referred to herein, interchangeably, as the Leonty Group, broke away from the Mother Church, formed an autonomous Metropolitan District and reserved the right to elect its own ruling bishop without regard for the authority of the Patriarch with respect thereto. This separation or declaration of autonomy by the Metropolia, admittedly, has never received the approval of nor has it been sanctioned by the Patriarch of the Church.

The principal issue before the lower Court was the ecclesiastical authority of Leonty and his subordinates over the petitioners at the time of the alleged suspension of petitioner, Reverend Burdikoff, on October 25, 1960. The crucial time is October 25, 1960, when the petitioner priest was allegedly stripped of his authority to act and function as "the Pastor and Priest of the Lorain Parish" by virtue of the action taken against him by Leonty.

The validity of the Leonty Group and the authority of Leonty as the ruling head of the Russian Orthodox Church in America must find support in the church law of this particular religious denomination. The mere association or connection of Reverend Burdikoff with Leonty, properly or improperly, for a short or long duration prior to July of 1960, could not invest Leonty with ecclesiastical authority over the petitioner as a Russian Orthodox priest or the Lorain parish as a Russian Orthodox Church. Moreover, this being a Holy Apostolic Catholic Church, Leonty or any prelate claiming authority as such in the Russian Church must have received the neccesary Aposolic Succession as a hierarch from the Superiors within the Church who may confer such succession with the approval and authorization of the Supreme Authority—The Patriarch. It is utterly ridiculous in a hierarchical church to contend that an inferior clergyman can confer such Apostolic Succession upon another cleric which would authorize the latter to act as his Superior. Certainly, there is no evidence in the record before this Court which would lead to the conclusion that the law of this denomination permits such a result. In fact, the sole evidence with respect thereto establishes that the inverse is true. The direct examination of one of the expert witnesses who testified on behalf of the defendants reveals the following (Tr. 621, 622):

"Q. Now, if a layman or clergyman or a Bishop of the Russian Orthodox Church who existed for a while in a state of schism—is there any procedure in the Church where he can return and regain the proper standing within the Church?"

"A. Certainly there are. A provision is made for the return of an erring cleric to the bosom of the Holy Church. That is just as there are provisions of the return for any kind of sinner to the Church, the Mother Church. A cleric is received back into the Church after petitioning the Church and asking to be received back and showing that he is repentant of the sin of schism, which he has abided, and if the Church wishes to show condenscension, it will receive this erring cleric or Bishop, or layman, back into the bosom and after due confession of the sin of schism and absolution for this sin and concelebration in the Holy Liturgy, and receiving the sacrament of the Communion, this erring cleric or Bishop, or layman, is reinstated back into the good graces of the Church and Canonical submission and obedience to the Mother Church."

Obviously, Leonty must derive his authority to act as a Russian Orthodox Hierarch from those in the church who have it within their power, according to the law of the church, to confer such authority. The self-serving actions of Leonty's predecessors in breaking away from the Mother Church could not validate Leonty's authority at the time in question by the mere passage of time, as the lower court has held.

In the instant action, the right to the use and occupancy of a church in the city of Lorain is in dispute. The right to such use is claimed by the respondents as adherents of the Leonty group and by virtue of Leonty's alleged suspension of Reverend George Burdikoff who was the priest and rector of the Lorain parish until the filing

of this action and the issuance of a restraining order against him. Petitioner Burdikoff bases his right to continue to function and officiate as the parish priest and rector on an appointment in June of 1960 by the Acting Exarch and ruling head in the United States of the Russian Orthodox Church, to-wit: Bishop Dositheus Ivanchenko of New York. The determination of the right to use and occupy the Lorain parish depends upon whether Leonty or Dositheus is the ruling hierarch for the American churches. If, according to the church law governing this denomination, Leonty is the ruling head of the Russian Orthodox Church in the United States, and if the alleged suspension of petitioner Burdikoff was properly taken, then the decision below is constitutionally proper.

We submit that the precise issue of whether Leonty is the ruling hierarch for the American churches religiously affiliated with the Russian Orthodox Church was passed upon and determined by this Court in *Kedroff* and *Kreshik*. The contention and central point of the Metropolia's "autonomy" and "right to select its own ruling bishop" independent of the Supreme Church Authority of the Russian Orthodox Church, to-wit, the Patriarch of Moscow and All Russia and its Holy Synod, was vigorously and exhaustively asserted by the "Leonty Group" in *Kedroff* and *Kreshik*, and rejected by this Court.

A careful study of the various opinions of the New York Court of Appeals and of this Court in *Kedroff* and *Kreshik* leads to the inescapable conclusion that the principal issue in said cases involved the determination whether Leonty, who was elected to his ecclesiastical office by a sobor of the American churches, or the appointee of the Patriarch of Moscow, is the ruling hierarch for the American churches. The instant case and the *Kedroff* and *Kreshik* cases involve the identical question as to who is

entitled to the use and occupancy of a church of the Russian Orthodox denomination as between disputants who are adherents of such faith. In *Kedroff* and *Kreshik*, the church was a cathedral, and in this case, it is the local church of the same religious denomination. Nevertheless, the crux of the matter in both cases is "the power to exercise religious authority." In his concurring opinion in *Kedroff*, Mr. Justice Frankfurter very aptly stated the issue, as follows:

> "What is at stake here is the power to exercise religious authority. That is the essence of this controversy. It is that even though the religious authority becomes manifest and is exerted through authority over the Cathedral as the outward symbol of a religious faith."

There can be no denying that in *Kedroff* the Leonty group sought possession and control of St. Nicholas Cathedral, and specifically its occupation by Leonty, on the ground that he is the ruling hierarch of the Russian Orthodox Church in America. In order to decide whether Leonty, in fact, was such head, and, therefore entitled to the use and occupancy of the Cathedral, this Court first had to examine the Church law and determine whether he was validly selected to such office in conformity with the law of the Russian Orthodox Church. Implicit, therefore, in the judgment of this Court in *Kedroff* is the rejection of the claim of the Leonty group. In other words, this Court has held that since Leonty was not appointed and/or approved by the Moscow Patriarchate, he is not the ruling hierarch of the American churches, and thus he cannot exercise religious authority as such. Although the immediate dispute in *Kedroff* and *Kreshik* involved the right to the use and occupation of a cathedral, the central point in issue was the question of which of the contending parties—Leonty, or the appointee of the Patriarchate—

could occupy the Cathedral and thereby exercise ecclesiastical authority over the American communicants and American Churches of the Russian Orthodox Church. Mr. Justice Reed in delivering the opinion of the Court in *Kedroff* stated the issue as follows:

> "The right to the use and occupancy of a church in the city of New York is in dispute.
>
> "The Right to such use is claimed by appellee, a corporation created in 1925 by an act of the Legislature of New York, Laws of New York 1925, c. 463, for the purpose of acquiring a cathedral for the Russian Orthodox Church in North America as a central place of worship and residence of the ruling archbishop 'in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the Holy Scriptures, Holy Tradition, Seven Ecumenical Councils and Holy Fathers of that Church.'
>
> "The corporate right is sought to be enforced so that the head of the American churches, religiously affiliated with the Russian Orthodox Church, may occupy the Cathedral. *At the present time that head is the Metropolitan of All America and Canada, the Archbishop of New York, Leonty, who like his predecessors was elected to his ecclestiastical office by a sobor of the American churches.*
>
> "That claimed right of the corporation to use and occupancy for the archbishop chosen by the American churches is opposed by appellants who are in possession. Benjamin Fedchenkoff bases his right on an appointment in 1934 by the Supreme Church Authority of the Russian Orthodox Church, to wit, the Patriarch locum tenens of Moscow and All Russia and its Holy Synod, as Archbishop of the Archdiocese of North America and the Aleutian Islands. The other defendant-appellant is a priest of the Russian Ortho-

dox Church, also acknowledging the spiritual and administrative control of the Moscow Hierarchy.

"*Determination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Benjamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American churches.*" (Emphasis ours.)

In the opinion of the Court, Mr. Justice Reed further stated as follows:

"This controversy concerning the right to use Saint Nicholas Cathedral is strictly a matter of ecclasiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the Archdiocese of North America."

And further stated:

"Even in those cases when the property right follows as an incident from decisions of the Church custom or law on ecclesiastical issues, the church rule controls. This under our constitution necessarily follows in order that there may be free exercise of religion."

Petitioners further respectfully invite the attention of this Honorable Court to the concurring opinion of Mr. Justice Frankfurter in the *Kedroff* case, and from which we quote as follows:

"Again, it is argued that New York may protect itself from dangers attributed to submission by the Mother Church in Moscow to political authority. To reject this claim one does not have to indulge in the tendency of lawyers to carry arguments to the extreme of empty formal logic. Scattered throughout the country there are religious bodies with ties to various countries of a world in tension due in part

to shifting affiliation and orientation. The consideration which permeates the court's opinion below would give each State the right to assess the circumstances in the foreign political entanglements of its religious bodies that make for danger to the State, and the power, resting on plausible legislative findings, to divest such bodies of spiritual authority and of the temporal property which symbolizes it.

"The arguments by which New York seeks to justify this inroad into the realm of faith are echoes of past attempts at secular intervention in religious conflicts. *It is said that an impressive majority both of the laity and of the priesthood of the old local church now adhere to the party whose candidate New York enthroned, as it were, as Archbishop (Leonty). Be that as it may, it is not a function of civil government under our constitutional system to assure rule to any religious body by a counting of heads. Our Constitution does assure that anyone is free to worship according to his conscience. A legislature is not free to vest in a schismatic head the means of acting under the authority of his old church, by affording him the religious power which the use and occupancy of St. Nicholas Cathedral make possible.*

"The judiciary has heeded, naturally enough, the menace to a society like ours of attempting to settle such religious struggles by state action. *And so, when courts are called upon to adjudicate disputes which, though generated by conflicts of faith, may fairly be isolated as controversies over property and therefore within judicial competence, the authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to a schism.* (Watson v. Jones, 13 Wall. 679). This very limited right of resort to courts for determination of claims, civil in their nature, between rival parties among communicants of a religious faith is merely one aspect of the duty of courts to enforce the rights of members in an associa-

tion, temporal or religious, according to the laws of that association." See *Gonzalez v. Archbishop*, 280 U. S. 1, 16-17. (Emphasis supplied.)

To borrow from the language of Justice Reed in the *Kedroff* case, the issue in the instant action may be stated as follows:

> "This controversy concerning the right to use St. Peter and St. Paul's Church of Lorain, Ohio, is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthdox Church, through its appointee and ruling head in the United States, to appoint the pastor and rector of the Lorain Church."

The petitioner Burdikoff, as the priest and rector of the Lorain parish, is approved and confirmed in office by the Moscow Patriarchate through its duly constituted appointee and representative in the United States, its Acting Exarch and ruling Bishop, Dositheus Ivanchenko. If the Moscow Patriarchate is the true Supreme Authority of the Russian Orthodox Christians in the United States, then the petitioner Burdikoff is the validly appointed and approved priest and rector of the plaintiff church. This fact as to the authority of the Moscow Patriarchate also has been established by the aforesaid decisions of this Court, and with specific reference thereto, Mr. Justice Frankfurter in his concurring opinion in *Kedroff*, stated as follows:

> "Finally we are told that the present Moscow Patriarchate is not the true Superior church of the American communicants. The vicissitudes of war and revolution which have beset the Moscow Patriarchate since 1917 are said to have resulted in a discontinuity which divests the present Patriarch of his authority over the American church. Both parties to the present controversy agree that the present Patriarch is the

legitimately chosen holder of his office, and the account of the proceedings and pronouncements of the American schismatic group so indicate. Even were there doubt about this it is hard to see by what warrant the New York Legislature is free to substitute its own judgment as to the validity of Patriarch Alexy's claim and to disregard acknowledgment of the present Patriarch by his co-equals in the Eastern Confession, the Patriarchs of Constantinople, Alexandria, Antioch, and Jerusalem, and by religious leaders throughout the world, including the present Archbishop of York." (May we add also, recognition by the World Council of Churches which recently, Nov., 1961, admitted the Russian Orthodox Church to membership).

"The account of proceedings and pronouncements of the American Schismatic group" mentioned by Justice Frankfurter as indicating recognition of the Patriarch by the Leonty group ("American Schismatic group") are also in the record of this case (Pl. 27, 28, Def. Ex. M, R, Tr. 37, 636, 637, 660, 661).

Without unduly burdening this Court, we believe it is sufficiently clear that the crucial questions which have been raised in the instant case have been heretofore examined exhaustively and passed upon most carefully by this Court. The respondents, therefore were estopped from seeking a reexamination of the same issues in this case. This Court has determined conclusively and with finality that the Moscow Patriarchate is the Superior Church of the American communicants of the Russian Orthodox religion. The respondents unequivocally refuse to recognize the authority of the Patriarchate and they submit their allegiance to alleged hierarchs who are in schism with the Mother Church and unapproved as such by the Supreme Authority. The respondents' declaration of independence

from and rejection of the authority of the Moscow Patriarchate amounts to a secession and schism on their part, thereby forfeiting all rights, interests and privileges which they may have had as members of the Lorain church. *Watson v. Jones*, 13 Wall. 679.

It is our contention that the crucial and material facts in this case have been passed upon and established by a court of competent jurisdiction in the former cases and that the respondents are in privity with a party or parties to said actions. The interests of the respondents in this action are derived or acquired from or through Leonty and his group. Respondents sought to enjoin and the lower court acted against the petitioners on the basis of Leonty's authority over them, and not on any issue of local law or practice.

The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the ground work upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.

Every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based is as effectively passed upon as the ultimate question which is finally solved.

The rule of estoppel is stated in 31 *Corpus Juris Secundum*, page 193, Section 4 as follows:

> "An estoppel by matter of record is such as arises from, or is founded on, the adjudication of a competent court, more broadly, estoppel by record is the preclusion to deny the truth of matter set forth in a record, whether judicial or legislative, and also to

deny the facts adjudicated by a court of competent jurisdiction."

Page 194, Section 5:

"It is a well established rule * * * that the records of a court of justice, including the record of judgment, import absolute verity; *and no one, whether or not a party to the proceedings in which they were made,* may in a collateral proceeding impeach them by adducing evidence in denial of the facts of which they purport to be a memorial." (Emphasis ours.)

Page 194, Section 6:

"* * * As a judgment, the record has the further effect of precluding a re-examination into the truth of the matters decided; this further effect of the record considered as a judgment is otherwise known as estoppel by judgment, the matters adjudicated being termed res judicata."

2. The decision below directly interferes with the constitutional right of freedom of religion guaranteed by the First Amendment as incorporated in the Fourteenth Amendment.

The lower court has found as an undisputed fact that the Lorain Church was established and has existed until sometime in 1924 as an integral part of a larger denominational church body known as the Russian Orthodox Church with a Patriarch and Holy Synod as the Supreme authorities thereof. The said court further found as an undisputed fact that the so-called declaration of autonomy and the formation of a metropolitan district known as the Metropolia, independent of and beyond the jurisdiction of the Supreme authorities of the Russian Orthodox Church, are deemed schismatic and its adherents considered under interdict by the Patriarch of the Church. However, the Court of Appeals concluded, as a matter of law, that this

unquestioned paramount jurisdiction of the Patriarch and Holy Synod over the American communicants and the Lorain Church of the Russian Orthodox Church was forfeited on the legal theory of laches, equitable estoppel or waiver of a known right. This conclusion was reached notwithstanding the fact that the record is completely devoid of any evidence whatsoever that such a result is possible under the ecclesiastical law of the subject church. This transfer of spiritual jurisdiction over the Lorain Church and its pastor has been brought about by state power, through judicial fiat. Thus, by virtue of a judicial decree, the canonical jurisdiction of the Patriarch of the Russian Orthodox Church over the Lorain Church, its cleric and faithful, was abrogated and transferred to a body and alleged hierarch which and who have seceded from the true church.

There is no dispute on the material and controlling fact that the pastor of the Lorain parish must have his appointment from and/or be confirmed as such by the ruling hierarch of the Russian Orthodox Church in America. The Metropolitan District, under Leonty as its ruling hierarch, has suspended the Reverend George Burdikoff as the pastor of the Lorain Church. It was by reason of this action of the Metropolitan District that the permanent injunction against Reverend Burdikoff was issued by the lower courts. And this judicial decision was reached notwithstanding the finding of the lower court that "to the Patriarchate in Moscow it (the Metropolia) is deemed schismatic and its clergy and people under interdict." If the appointment or confirmation of the parish priest in Lorain must come from the ruling hierarch of the Russian Church in America, and the alleged ruling hierarch, Leonty, who suspended petitioner Burdikoff "is deemed schismatic" and "under interdict" by the Supreme au-

thority of the Church—the Patriarch, how can there be any dispute that the judicial decree complained of herein is not in "strict subordination to the ecclesiastical law" of the church prior to schism, and therefore, unconstitutional? Moreover, if the Patriarch through his appointee, as the ruling hierarch of the Church in America, designates and confirms petitioner, Reverend Burdikoff, as the pastor of the Lorain Church, how can such right conferred under canon law upon the ruling Metropolitan of the North American Archdiocese of the Russian Orthodox Greek Catholic Church, as the appointee of the Patriarch of Moscow, be constitutionally impaired by judicial decree? Obviously, we have here a transfer by judicial decree of control over churches. This is clearly invalid under the constitutional prohibition against interference with the exercise of religion on the theory that the principles of the First Amendment are made applicable to the states by the Fourteenth Amendment to the Constitution of the United States.

The decision of this Court in the *Kreshik* case makes evident that the court's ruling in *Kedroff* is controlling and applicable to the improper exercise of any state power, be it through its legislative or judicial branch.

Although in *Kedroff* the court addressed itself to the validity of legislative action, as a result of the *Kreshik* decision, the same declaration of improper legislative action, in this area, is applicable to the assertion of state power through judicial action. In the court's opinion in *Kedroff*, Mr. Justice Reed stated as follows:

> "We conclude that Article 5-C undertook by its terms to transfer the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the gov-

erning authorities of the Russian Church in America, a church organization limited to the diocese of North America and the Aleutian Islands. This transfer takes place by virtue of the statute. Such a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion. *Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes adopted at a general convention (sober) held in the City of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto, * * *, prohibits the free exercise of religion.*" (Emphasis added.)

If we insert judicial action in lieu of the aforementioned legislative action, by virtue of the *Kreshik* ruling, the conclusion is inescapable that the constitutional guarantees of freedom of religion have been breached by state action. Thus, if we apply the aforesaid ruling of this Court to judicial action, the decision of the lower court constitutes an unlawful intrusion into the internal affairs of a religious body, violative of the First Amendment's guaranty of freedom of religions from such governmental interference.

Basic to this case is the fact that the Constitution of the United States prohibits state interference with the internal control of church administration and of clerical appointments. It is this constitutional prohibition which is paramount in the *Kedroff* and *Kreshik* decisions of this Court involving this same church. The order below sanctions what this Court said a state court may not do in the area of religious freedom. The lower court decision denies to adherents of this church the freedom to worship according to the canons, laws and traditions of their chosen religion which, in this instance, provide that a cleric must

be approved and be recognized by the Patriarch of the church through his appointee, the ruling hierarch of the Church in America. It has sanctioned the ouster of a cleric from the religious duties entrusted to him by the ecclesiastical government of the subject church—the Patriarchate. In our case, the authority of a schismatic hierarch—Leonty, to suspend a cleric, and the power of the secessionist group to usurp spiritual control over a Russian Orthodox Church, has been conferred by state power through judicial fiat, and not according to the ecclesiastical law or by the ecclesiastical government of the Russian Orthodox Church. Under our governmental system, this is constitutionally improper.

The lower court, contrary to the established law and in clear violation of the constitutional guarantees of religious freedom, as aforesaid, has enunciated a novel theory to support its decision, namely—that the canonical or spiritual jurisdiction of the Patriarch of the Russian Orthodox Church over its American churches, clergy and communicants may be abrogated by a state court on the principles of laches, equitable estoppel or waiver of a known right.

There is no support, whatsoever, in our law for such a conclusion. More seriously, we do not believe that the court's application of the rules of waiver, laches, or adverse possession avoids the constitutional rule against prohibition of the free exercise of religion. The gravity of the lower court's error in this regard may be seen from the statement of Mr. Justice Reed in the opinion of this Court in *Kedroff*, wherein he wrote as follows:

> "* * * it seems clear that the Russian Orthodox church was, until the Russian Revolution, an hierarchical church with unquestioned paramount jurisdiction in the governing body in Russia over the

American Metropolitanate. *Nothing indicates that either the Sacred Synod or the succeeding Patriarchs relinquished that authority or recognized the autonomy of the American Church.* (Emphasis ours.)

"The record before us shows no schism over faith or doctrine between the Russian Church in America and the Russian Orthodox Church. It shows administrative control of the North American Diocese by the Supreme Church Authority of the Russian Orthodox Church, including the appointment of the ruling hierarch in North America from the foundation of the diocese until the Russian Revolution. We find nothing that indicates a relinquishment of this power by the Russian Orthodox Church."

In the instant cause, also, there is nothing in the record to indicate that the Supreme Church Authority of the Russian Orthodox Church relinquished its authority over the Lorain Church and its communicants. This Court has held that when courts are called upon to adjudicate religious disputes, their authority is in strict subordination to the ecclesiastical law of the particular church prior to schism. Admittedly, the Supreme Authority of the Russian Church and its communicants in North America prior to the alleged schism in 1924 was the Patriarch of Moscow and All Russia. This paramount authority, according to the logic of the lower court, was lost and is completely ineffectual in the instant dispute as a result of the schismatic conduct of Leonty and the Metropolitan District. This conclusion, however, must be supported by the ecclesiastical law of the Russian Orthodox Church in order to be constitutionally proper. In other words, if it were proven that by rule, custom, canon or tradition of this particular denomination the Patriarch can lose, forfeit or relinquish his Supreme Authority over the American communicants of the church by the unauthor-

ized and unapproved actions of a prelate and his followers, acting in the name of the Russian Orthodox Church over a period of years, then, of course, the decision below would would be "in strict subordination" to the law of the subject church and, therefore, constitutionally valid. The record is completely devoid of any such evidence. Quite clearly, the decision below is invalid in that it enters the domain of religious control barred to the State by the Fourteenth Amendment. It is settled by this Court that "it is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *N. A. A. C. P. v. Alabama*, 357 U. S. 494, 463, *Shelley v. Kraemer*, 334 U. S. 1, 14-16.

3. The Federal Questions presented are substantial.

It is readily apparent that the decision of the Court of Appeals below raises serious questions which transcend the complaints of these petitioners. The interference with religious freedom is serious and manifest, the theory of decision is unprecedented and contrary to correct constitutional doctrine. It holds potentials of danger to all churches and invests the civil courts with power to reorganize their internal discipline and nullify their canon law. It is in conflict with this Court's decisions in *Kedroff* and *Kreshik*, and with *Watson v. Jones*. The writ should be granted.

CONCLUSION.

This Court in *Kedroff* and *Kreshik* has pronounced itself exhaustively and conclusively on the problems of spiritual anarchy which have beset the Russian church in the United States for almost 40 years. Every conceivable contention, claim and/or argument which have been raised or could have been raised concerning the difficulties within this church have culminated in the findings, decisions and judgments of this court. The Metropolitan District and Leonty as its alleged ruling hierarch have attempted and are attempting to exercise religious authority over all American communicants, clergy and parishes of the Russian Orthodox Church contrary to the laws and ecclesiastical government of said denomination.

This Court has declared emphatically and clearly that Leonty is "schismatic" and therefore not the "ruling hierarch" of the American communicants. In view thereof, he is without authority to exercise the rights and prerogatives of the office of the ruling hierarch of the Russian Orthodox Church in America, and his alleged suspension of petitioner, Reverend Burdikoff, is of no force and effect.

It is, therefore, respectfully submitted that this Court should grant the petition for certiorari and should reverse the final judgment of the Court of Appeals with directions to dismiss respondents' amended petition.

Respectfully submitted,

JOHN R. VINTILLA,

Attorney for Petitioners.

APPENDIX A.

OPINION OF THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT CASE NO. 1558. DECIDED JULY 25, 1962.

HUNSICKER, *J.*

An appeal on questions of law and fact has been lodged in this Court from a judgment entered by the Common Pleas Court of Lorain County, Ohio. In this Court the case is being tried de novo on the same testimony and exhibits presented to the trial court.

The temptation is very great to detail the history of the Orthodox Greek Catholic Churches of the Eastern Confession. The historical development of Christianity in the eastern churches is a subject that is not stressed in our schools, yet out of the Greek Catholic Churches much of the early foundation of the Christian Church was formed. The lives of its saints, and writings of its scholars, are worthy of emulation and study.

The Russian Orthodox Greek Catholic Church first came into the United States from Alaska. Thereafter, some churches were founded in California. It spread from west to east, and eventually established its seat in New York City. This church, being hierarchal, recognized as its primate and spiritual head the Patriarch of Moscow, Russia.

At the time of the revolution in Russia, and for years thereafter, great confusion existed in the Russian Orthodox Churches in the United States as to the condition of the mother church. The attempt, by the Soviet government, to abolish religion, and particularly the Russian Orthodox Church, was widely known. The later attempt of the Soviet government to take control of the Russian Orthodox Church, as had been the case under the czars, was feared by the Russian Orthodox clergy and their congregations in the United States. The questions arose as to who was the canonically lawful patriarch, and who was

his canonically lawful representative archbishop or exarch in America.

The problem of proper church authority was disturbing to the church in Lorain, Ohio, as well as to the other churches of the Russian Orthodox Confession in the United States. In April, 1924, representatives of Russian Orthodox churches met in a church convention, or sobor, in Detroit, Michigan. The convention had no desire to form a new church, but it did wish to become autonomous, rather than become an autocephalous church. This sobor did declare itself an administratively autonomous metropolitan district, known as The Russian Orthodox Catholic Church of America.

This metropolitan district is now known as the Metropolia, and it has been, since 1924, accepted as the leading Russian Orthodox Church in America. To the Patriarchate in Moscow it is deemed schismatic, and its clergy and people under interdict. The Metropolia has two theological seminaries and many churches.

There is a third group of churches which follow the rites and liturgy of the Russian Orthodox Church; this group is known as the Anastassy Synod, or Russian Church Abroad. We are not interested in that group herein, except that one of the appellants, The Reverend George Burdikoff, was first a priest in one of the churches functioning under its authority. He later switched his allegiance to the Metropolia, the ruling archbishop of which is now Metropolitan Leonty. The Reverend George Burdikoff later again switched his allegiance to the Patriarch of Moscow, and that action on his part gives rise to all of the controversy herein.

The appellee Church of St. Peter and St. Paul in Lorain, and its members, were faithful followers of the Patriarch of Moscow from the time of the founding of the

Lorain Church in 1912, until in 1925, when they accepted the authority of the Metropolia. The Lorain Church became a corporation in 1920. In February, 1925, a new church building and improvements were contemplated, and the church corporation filed an action against Bishop Alexander of the Russian Orthodox Church and others to quiet the title to the church property. Judgment in that action was entered, and the title quieted in the parish corporation. Bishop Alexander was Bishop Alexander Nemolovsky, the acting ruling Bishop of the Russian Orthodox Church, in whose name, with others, title to the property was previously transferred.

Since 1925 the Lorain Church and its congregation have been served by a priest who accepted the authority of the Metropolia. It sent clergy and lay delegates to functions of the Metropolia, as well as the sobors held under the jurisdiction of the Metropolitan of the Russian Greek Catholic Church in America, who is now Metropolitan Leonty.

The Lorain Church in all things supported the Metropolia, and has supported financially no other church group, except as it may have done so under the authority of the Metropolia.

The Reverend George Burdikoff was active in the affairs of the Metropolia and its deanery until in June, 1960, he secretly accepted the authority of the Patriarch of Moscow by acknowledging his sin of schism. He thereafter received appointment to the Lorain Church as a priest subject to that religious prelate, instead of to Metropolitan Leonty.

The Metropolia has declared itself to be an autonomous body, whose doctrine, discipline, and worship, are those of the one Holy Catholic and Apostolic Church, as taught by Holy Scripture, Holy Tradition, the Seven

Ecumenical Councils, and the Holy Fathers, and as kept by the Orthodox Churches of the East. It is a member of the World Council of Churches, which accepts into its membership only autonomous church bodies. The Patriarch of Moscow has brought the Russian Orthodox Church into the World Council of Churches, thereby recognizing the Metropolia as an autonomous church.

Thus for 35 years one autonomous church body has occupied the church building, received dues and other monies, supported its superiors, and the superior church body, the Metropolia. In all this time the church which formerly claimed spiritual and temporal jurisdiction has done nothing to oust the group which it calls schismatic from occupation and control of the Lorain Church. It now seeks to do so by the subterfuge of a priest who has switched allegiance when it best served his personal interest.

When the action of Reverend George Burdikoff became known to the congregation, complaint was made to Bishop John and Metropolitan Leonty, the superior church officers of the Metropolia in whose jurisdiction the Lorain Church had functioned for 35 years. The Reverend George Burdikoff was ordered to move to a new parish, and, upon his refusal to do so—he claiming that these former superior ecclesiatics did not now have spiritual or temporal jurisdiction over him—he was deposed as a priest of the Metropolia.

Bishop John of the Metropolia, with the blessing of Metropolitan Leonty, and at the proper request of the members of the Lorain Church, then ordered a congregational meeting. At this meeting the plaintiff (appellee) officers and trustees of the parish were elected. These officials and the parish corporation then instituted the present action, asking that the defendants (appellants),

who claim to be officers of the church, and The Reverend George Burdikoff, be enjoined from occupying the Lorain Church, and that The Reverend George Burdikoff be enjoined from officiating as a priest or rector of the congregation in the church building. The amended petition of the plaintiffs also prays for an accounting of all monies and funds of the parish, and that all property, both real and personal, be restored to the church under the jurisdiction of Metropolitan Leonty.

The defendants (appellants) deny that Metropolitan Leonty, or the Russian Orthodox Greek Catholic Church of America, has any right, title or interest in the Church of St. Paul of Lorain, Ohio. The appellants assert that this church is under the jurisdiction of the Patriarch of Moscow, and not subject to the claims of the Metropolia. They further say that The Reverend George Burdikoff was engaged on or about October 14, 1957, to serve this Church as pastor for a period of 10 years, and that that contract is subsisting and in full force.

It has long been the accepted rule in the government of religious societies which are in association with an ecclesiastical system, that, where one or many of the members withdraw from the general church, they cannot take with them the church property. That property, in the absence of agreement, remains under the jurisdiction and control of the general church: 45 *Am. Jur.*, Religious Societies, Sec. 16, *et seq.*, and authorities there cited; 76 *C. J. S.*, Religious Societies, Sec. 15 and 71b, and authorities cited; 47 *O. Jur.* 2d, Religious Societies, Sec. 20; *Trustees of Pencader Presbyterian Church, et al., v. Gibson, et al.*, 22 A. 2d 782; *Presbytery of the Everglades v. Morgan, etc.*, 125 S. 2d 762; *Bray v. Moses*, 202 S. W. 2d 749; *Presbytery of Bismark, et al., v. Allen, et al.*, 22 N. W. 2d 625.

The appellants insist that, under the above general rule, and two recent opinions of the Supreme Court of the United States, wherein matters affecting the Russian Orthodox Catholic Church were decided, the injunction sought herein should be denied.

In the case of *Kedroff v. Saint Nicholas Cathedral*, 344 U. S. 94, 97 L. Ed. 120, 73 S. Ct. 143, an action in ejectment was brought by the Metropolia against the patriarchal church, which occupied and conducted services in the cathedral. The ground of the action was a statute of New York which required the transfer and control of all New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Orthodox Church in America, or, as we have designated it herein, the Metropolia.

The court there said, at page 107 of 344 U. S., page 132 of 97 L. Ed.:

> "* * * This transfer takes place by virtue of the statute. Such a law violates the Fourteenth Amendment. It prohibits in this country the free exercise of religion."

In the case of *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190, 4 L. Ed. 2d 1140, 80 S. Ct. 1037, the same issue was raised as was raised in the case of *Kedroff v. St. Nicholas Cathedral, supra*, except that the ejectment was based upon the common law claim that the Patriarch of Moscow could not validly exercise the right to occupy a cathedral of his faith. The court then reiterated that the right of the appointee of the Patriarch of Moscow to use and occupy a cathedral owned by the respondent (patriarchal) corporation was strictly a matter of ecclesiastical government.

These cases are no authority for the position taken by the appellants herein. Here the patriarchal church seeks, in effect, by means of the subterfuge of The Reverend George Burdikoff, to eject those who have occupied the church herein for a period of 35 years.

There can be no question in this case but that the money in banks, church money in the hands of the one who was acting as treasurer at the time of the attempted change to allegiance of the Patriarch of Moscow, and such other church funds on hand at the time when The Reverend George Burdiffoff sought to bring the church into the patriarchate, were monies contributed by those who accepted Metropolitan Leonty as their spiritual leader. As to such funds there should be an accounting, conducted under auspices of the trial court.

The real property in the instant case was used openly by those claiming the Metropolia as the church authority, under which the Church of St. Peter and St. Paul of Lorain, Ohio, functioned. Title to the church lands was in the corporation, whose officers held it for the use of the Metropolia. This provision for the use and benefit of the Metropolia lasted 35 years before a challenge was made by The Reverend George Burdikoff, acting for the Patriarch of Moscow.

Those who accept the Metropolitan Leonty and the Metropolia have expended money on the church property. They have in all things held the church out to the general public, to other church bodies, and to the Patriarch of Moscow, as an integral part of the autonomous Russian Orthodox Greek Catholic Church of America.

While adverse possession may not be the proper legal basis upon which to declare the church to be under the spiritual direction of the Metropolia, since title to the prop-

erty has been and will remain in the corporation, nevertheless long continued acquiescence in the use by the Metropolia, the recognition by the Patriarch of Moscow that the Metropolia is a separate church body, and the many years that the officers of the corporation held the real property for the use and benefit of the Metropolia only, raises the issue of laches or of estoppel to now claim the right of spiritual jurisdiction.

Delay alone in asserting a right does not itself constitute laches; yet where, as here, there is knowledge and long acquiescence in the use of the property, the equitable doctrine of laches ought to apply. *Smith v. Smith*, 168 O. S. 447.

Whether we approach the problem from statutory limitations of actions theory under claims of adverse possession, or on the theory of laches, equitable estoppel, or waiver of a known right, we must conclude that the spiritual jurisdiction of the Church of St. Peter and St. Paul of Lorain, Ohio, is within the Metropolia. The action brought in 1925 to quiet title in the corporation against Bishop Alexander was followed by submission to the Metropolia. It was the corporation which brought that action, and perhaps a claim of adverse use may not now be made against the same corporation, but surely waiver, estoppel and laches constitute valid reasons why the Patriarch of Moscow should not now be permitted to claim spiritual jurisdiction of this church. *Greek Catholic Church of St. Michaels v. Archbishop Platon Roizdestvensky, et al.*, 67 Colo. 217, 184 Pac. 295, 18 A. L. R. 690; *Puckett v. Jessee*, 195 Va. 919, 81 S. E. 2d 425; *St. Paul's Reformed Church v. Hower* (Pa.), 43 A. 221; 76 *C. J. S.*, Religious Societies, Sec. 73; 45 *Am. Jur.*, Religious Societies, Sec. 69; 76 *A. L. R.* 304. See also, *Roumanian Orthodox Missionary Episcopate v. Trutza*, 205 Fed. 2d 107.

The Reverend George Burdikoff says that he entered into a contract to serve this church. The term of the contract was 10 years. Only a portion of that time has elapsed, and hence he claims the right to continue as priest. There is no merit whatsoever in such claim. He breached his contract by making his submission to Moscow; he violated the conditions under which he was serving this church; and he cannot now be heard to complain that he is deprived of a right under a contract which he himself repudiated.

It is the judgment of this Court that a dec · shall be entered as was entered in the trial court. The cause shall be returned to the trial court for an accounting of the money, property, and other assets, of the church. All assets shall be returned to the plaintiffs-appellees herein.

The Court of Appeals cause numbered 1541 is dismissed, at the costs of the appellant.

STEVENS, *P. J.*, and DOYLE, *J.*, concur.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT.

This case having been tried de novo on appeal of law and fact the court finds in favor of the Plaintiffs-Appellees, The Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio, Gregory Sandor, Mike Hrubic, Mike Chemorov, Mike Kowalchyk and against the Defendants-Appellants, Rev. George Burdikoff, Stephan Loboda, Harry Yavornitzky, Michael Yuhas and Andrew Patrick and makes the same findings and decree as entered in the trial court in this proceeding. The court finds the Plaintiffs-Appellees are entitled to the relief as prayed for in their petition as amended.

Now, therefore, by reason of law and findings aforesaid, it is hereby ordered, adjudged and decreed that the preliminary injunction heretofore granted by the lower court is made perpetual and is hereby ordered that a permanent injunction be granted against Rev. George Burdikoff of the Patriarchal Group of Moscow from officiating as priest or rector of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio and that the Defendants Stephan Loboda, Harry Yavornitzky, Michael Yuhas, Andrew Patrick, and Rev. George Burdikoff and others connected with them are hereby perpetually enjoined from serving or officiating as officers of the church and from using or occupying said church in said offices or of retaining or controlling or using any of its property or monies or assets and that the property, both real and personal, and assets of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio be and hereby is ordered restored to the Plaintiffs herein and it is further ordered that an accounting of the

assets of the church be made by the Defendants-Appellants, to the Plaintiffs-Appellees.

It is further ordered that this case be remanded to the trial Court for an accounting of the money, property and other assets of the church and for enforcement of this judgment and that the Defendants-Appellants pay the costs herein; exceptions are noted for the Defendants-Appellants.

APPENDIX C.

OPINION OF COURT OF COMMON PLEAS, LORAIN COUNTY, OHIO.

This is a proceeding to determine which of two groups have the right to the use of, possession of and physical control of the property of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio.

The two groups we refer to are as follows:

1. The group known as the Russian Orthodox Church who receive their authority from or under the Patriarch of Moscow and his Holy Synod.

2. The group known as the Russian Orthodox Greek Catholic Church of America which derives its authority from the Sobor held in America in 1924 and known and referred to as the Metropolia or Leonty Group.

FINDINGS OF FACT.

The Lorain Church, the plaintiff in this proceeding, was started in 1912. It was incorporated under the Ohio Laws March 1, 1920. On February 27, 1925, Case No. 22193, Lorain County Common Pleas Court was filed by the Parish Corporation vs. Alexander Nemolovsky as acting ruling Bishop of the North American Diocese of The Russian Orthodox Church and Bishop Alexander to quiet title. Service by publication and default judgment granted May 25, 1925.

From its inception in 1912 until May 22, 1925, the Lorain Church was an active part of the North American Diocese of The Russian Orthodox Church under the Patriarch of Moscow.

In 1924, there was division or separation from The Russian Orthodox Church under the Patriarch of Moscow and the new group called themselves The Metropolitan

District or Metropolia or the Leonty Group which the Lorain Group became a unit of.

From about May, 1925, the Lorain Church was an active part of the Metropolia or Leonty Group up until about the middle of 1960. A period about thirty-five years when the Lorain membership became divided—those adhering to the Metropolia being the plaintiff group and those adhering to The Russian Orthodox Church under the Patriarch of Moscow and known as the defendant group.

Rev. George Burdikoff applied to Archbishop Benjamin under the Metropolitan Leonty for appointment as pastor of Morgantown, West Virginia and was appointed and served and in July, 1955, asked Metropolitan Leonty for a transfer from Morgantown, West Virginia to the Lorain Church; the transfer being approved by Metropolitan Leonty or those under him and the Rev. George Burdikoff served the Metropolitan Leonty until some time in 1960 when differences between Rev. George Burdikoff and his followers came into open dispute with the plaintiff group.

Rev. George Burdikoff accepted the charge at the Lorain Church in 1955 and continued until 1960 serving the Metropolia in various capacities; attended Deanery meetings, rendering reports, making contributions and as leader of the church membership in obedience to Metropolia rather than the Church under the Patriarch of Moscow—all this until about the middle of 1960.

Rev. George Burdikoff was admitted to the Church under the Patriarch of Moscow on June 21, 1960, and he attended Deanery meetings under Metropolitan Leonty in September, 1960. In October or November, 1959, Rev. George Burdikoff contacted the Exarch, Bishop Dositheus of The Russian Orthodox Church in America under the Patriarch of Moscow.

Rev. George Burdikoff did not inform the church members of St. Peter and St. Paul's Church of Lorain from the pulpit or by publication that he had been accepted into the Church under the Patriarch but he did inform the Church Committee.

On July 26, 1960, Rev. George Burdikoff was ordered transferred to Mingo Junction under authority of the Metropolitan, which he refused and on September 20, 1960, he was ordered transferred to Ansonia, Connecticut, to be effective October 1, 1960, which he refused.

On June 21, 1960, Rev. George Burdikoff was given appointment to the Lorain Church by the Most Reverend Dositheus of New York under the Patriarch of Moscow.

The annual church meeting was called for September 25, 1960 by Rev. George Burdikoff and plaintiffs' Exhibit 11 is the report of the Priest and Officers to the membership and contains no mention of change from Metropolia to The Russian Orthodox Church under the Patriarch of Moscow, but does indicate continued faithfulness to support Metropolia. (See Stephan Loboda's report in Exhibit 11, fourth paragraph from the end of his report where he refers to Father Prislopsky and also the financial report reporting Metropolia Mission Dues—$141.00.)

Rev. George Burdikoff was suspended by Archbishop John of the Chicago-Diocese which was affirmed October 25, 1960, by the Council of Bishops under Metropolia.

That Rev. George Burdikoff in disregard of said suspension continued to serve as Priest and Pastor of the Lorain Church.

The defendants transferred substantial funds from the savings account to cash and placed the same as cash in a bank lock-box in Cleveland, Ohio.

A special membership meeting was called by the diocesan authority at the request of not less than twenty-

five parishioners after Rev. George Burdikoff was suspended and the plaintiffs were elected officers of the church at that meeting.

STATEMENT OF CASE.

The plaintiffs claim that Rev. George Burdikoff and the defendant officers are without authority to officiate; to perform the duties and functions of the church because he was suspended by Metropolitan Leonty.

The plaintiffs further claim that since the church has functioned under the Metropolia from 1925 to the present time the defendants are estopped from transferring the church from the Metropolia to The Russian Orthodox Church under the Patriarch of Moscow; that the statute of limitation applies and the defendants have waived any right that they may have had formerly; that the suit quiet title in 1925 estops the defendants from raising any questions concerning the same.

The Patriarch of Moscow is not represented and is not a party to this proceeding nor is anyone for him represented in this proceeding except in and through Rev. George Burdikoff as a Priest who has transferred from *the jurisdiction of the Metropolitan to the jurisdiction of* the Patriarch of Moscow.

This proceeding is for injunction and accounting. The accounting part, by agreement of counsel, was reserved for hearing after the matter of injunction was resolved.

The defendants deny the Lorain Parish is under the jurisdiction of the Metropolia; deny the plaintiffs are duly elected and acting officers of the Lorain Parish and deny the plaintiffs are authorized to bring this action.

The defendants claim that all of the alleged prelates and followers—priests and laymen alike—who have de-

fected from the Moscow Patriarch to the Metropolia are under suspension and interdict by his holiness the Patriarch and the Sacred Synod of The Russian Orthodox Church.

Defendants further claim that Rev. George Burdikoff did on October 14, 1957, accept a contract with the Lorain Church for a ten year period to serve as Pastor of the Lorain Church.

The defendants further claim that Rev. George Burdikoff is the Pastor of the Lorain Church by virtue of the authority vested in Bishop Dositheus, his immediate superior.

The defendants further claim that the Lorain Church, even though it defected to a Metropolitan in 1925, could not take the property of the church; that the property always remained under the jurisdiction of the church under the Patriarch of Moscow.

The defendants claim that the following cases are controlling:

80 U. S. 679, *Watson vs. Jones;*

The Presbyterian Church case growing out of the Civil War, the South going with slavery and the North Anti-slavery.

344 U. S., 94, *Kedroff vs. St. Nicholas Cathedral Case.*

These cases have established law and are widely followed and are accepted by this Court as the law when applied to facts as presented by these cases.

The case before the court presents facts as follows: Since 1925, the Lorain Church has faithfully followed Metropolitan Leonty or his predecessors in office. Rev. George Burdikoff and all former Priests between 1925 and 1960 were patrons of the Metropolia.

Rev. George Burdikoff secured his appointment to the Lorain Church through Metropolitan Leonty in 1955 and he personally led the church and it participated in every way as a unit of Metropolitan Leonty.

There is not one scintilla of evidence of the least connection between the Lorain Church and the Church under the Patriarch of Moscow directly or indirectly, except through the communication carried on between the Metropolitan Leonty Church, not as it pertains to the Lorain Church but as it pertains to a group as it concerns a public recognition of the Metropolitan Group by the Patriarch.

Theoretically speaking, the Church under the Patriarch of Moscow had knowledge that the Lorain Church withdrew and went over to the Metropolia and such a transfer would mean the termination of reports, contributions, communications, supervision, appointments and transfers under the Patriarch of Moscow.

The Metropolia is publicly recognized by the Patriarch of Moscow as a group and the Metropolia have asked the Patriarch of Moscow to be reinstated and the Patriarch of Moscow has replied they would be accepted only on certain conditions. (See Exhibits 26, 27, 28 and 29.)

By these communications and the conditions the Patriarch of Moscow recognizes there is a group of which the Lorain Church is a member, known as the Metropolia.

Both the Metropolia and the Church under the Patriarch of Moscow have been accepted as members of the World Council of Churches, which means that each recognizes the rights of the other.

The Church under the Patriarch of Moscow since 1925, when the Lorain Church withdraw, for the past thirty-five years has permitted the Lorain Church to continue in service and growth. (see plaintiffs' Exhibit 14,

pages 19 and 58) under the Metropolia. They have added many new members; purchased and improved their properties and have substantial bank accounts.

The Patriarch of Moscow had the right to claim this property in 1925 and thereafter. The Church under the Patriarch of Moscow stood by with full knowledge of the Church's service under the Metropolia, which was not acceptable to the Patriarch without concessions which were not conceded.

The Lorain Church under the Metropolia has been independent, as far as the Church under the Patriarch of Moscow is concerned for the past thirty-five years without protest or objection.

The only semblance of authority in the Lorain Church under the Patriarch of Moscow is that exhibited by Rev. George Burdikoff after June 21, 1960, when he was accepted under the Patriarch of Moscow.

22 Atl. 2d, p. 782, 1941:

"1. Religious societies

Where particular church congregation is in association with ecclesiastical system, and opinion or belief entertained by congregation materially differs from opinion or belief accepted by system, a 'schism' necessarily results, and congregation can secede, but cannot take with them the church property, even if the secession is unanimous.

See Words and Phrases, Permanent Edition, for all other definitions of 'Schism.'

2. Religious societies

A local church organization affiliated with general denominational church, was not an independent religious organization, and did not take with it the church property when it seceded from general denominational church, and could not thereafter use church property for advancement of doctrine established by local church.

3. Religious societies

Where local church organization unanimously seceded from general denominational church, members of general church had such 'interest' in property used by local organization as would permit members to sue to confirm use of property of local organization to worship according to doctrines of general church, since church property did not belong to local organization.

8. Religious societies

Where local church, in affiliation with and as constituent part of a general denominational church, sought security for its temporal affairs by founding a body corporate under Religious Societies' Act of 1787, property acquired by church grant was held by corporate body, not for opportunistic purposes and desires of local church or congregation, but in the sense of a trust for maintenance and furtherance of faith and creed of general denominational church. 2 Del. Laws, c. 144b.

18. Religious societies

Where property, not devoted by owner to support of any peculiar form of worship is held by religious congregation which is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with general power of control, in some supreme judicatory over whole membership of general organization, and question arises which relates to creed, and property right turns upon determination of correctness of religious creed, judgment of supreme ecclesiastical tribunal is conclusive, and civil court will allow property to go in that direction in which decision of church tribunal carries property.

19. Courts

In the United States, civil courts have no ecclesiastical jurisdiction.

22. Constitutional law
Religious societies

In the United States, no one individual is compelled to ally himself, or to remain identified, with any religious organization, but when he does join a church and becomes a member of that ecclesiastical body, he voluntarily surrenders his individual freedom to that extent, and so long as he desires to enjoy privileges flowing from the association, he must confirm to laws by which the religious organization is governed.

23. Religious societies

A member of local church organization affiliated with general denominational church has no right in the nature of a right of property in church assets which civil courts can protect."

50 *A. L. R.*, 666 at p. 787 -d- Judicial sales, and p. 862, Sec. 49—Expenditure of money upon property during period subsequent to transaction affecting it, and p. 871, Sec. 50b—Long-continued acquiescence in situation resulting from transaction.

20 *O. J.* 2d, p. 494, Sec. 31 Waiver; p. 495, Sec. 32, Laches; p. 496, Sec. 33, Assent acquiescence; p. 518, Sec. 52, Permitting expenditure.

18 *A. L. R.* 690, Greek Catholic Church, Colorado, 1919, Religious society—delay in suing for recovery of property—laches.

"1. Delay in instituting proceedings to recover church property transferred by the controlling majority of a religious society to a denomination other than that in which the church was organized until after its debts had been paid and valuable improvements placed upon the property will prevent a recovery."

See note at bottom of p. 692—Laches as preventing recovery of property diverted from one religious sect or denomination to another.

Commencing in 1925 The Russian Orthodox Church of Moscow had a right to have all property of the Lorain Church. They made no claims to it during all of these thirty-five years. The law aids the vigilant. They lost their rights by failure to act. The principles of adverse possession apply under facts established in this case and they require only twenty-one years and the Lorain Church under the Metropolia had open, notorious and continuous possession for over thirty-five years.

Can it be said that the Church under the Patriarch of Moscow can stand idly by for fifty years—for one hundred years or even two hundred years, for that matter, and come back at any time and claim their rights as originally established? This Court thinks they would lose their rights as they have in this situation and are estopped.

CONCLUSIONS OF LAW.

The Church under the Patriarch of Moscow have waived their rights to claim any interest in the property of the Lorain Church and are estopped to claim use or interfere with the use of the same.

Rev. George Burdikoff on June 21, 1960, was accepted and given the blessings under the Church of the Patriarch of Moscow. This petition on his part and their acceptance of him automatically terminate his relations with the Lorain Church under the Metropolia. No man can serve two masters. (See plaintiffs' Exhibit 9, and defendants' Exhibit X.)

Rev. George Burdikoff had a contract for ten years made October 14, 1957, with the Lorain Church (See defendants' Exhibit S) which church was since 1925 under the jurisdiction of the Metropolia and continued as such. When Rev. George Burdikoff, on June 21, 1960, petitioned for and accepted allegiance to the Church under the Patri-

arch of Moscow, it was equivalent to resigning his charge in the Lorain Church and the authorities under the Metropolia had just cause for expulsion—for again—no man can serve two masters. In other words, he ceases, by his own conduct and his own volition and choice to continue a member or priest of the Metropolia.

The parish meeting of December 4, 1960, was called by at least twenty-five members under Diocesan Authority at which time the plaintiffs were elected officers of the church as per the statutes of the church. (Plaintiffs' Exhibit 2, p. 86.)

The court finds the election of December 4, 1960, as per statute of the church. The defendants are not officers of the church since that date.

The question of the conduct of Rev. George Burdikoff is an issue in this matter and I refer to plaintiffs' Exhibit 10-A. This is an admission against interest. It is addressed to the large Sobor of Bishops of the Russian Orthodox Church, that is the Metropolia. It is dated November 9, 1959. No additional comments are necessary as Exhibit 10-A speaks for itself, in a very clear manner.

The court grants permanent injunction against Rev. George Burdikoff officiating as a priest or rector in the possession or use of the church property as a priest or rector and grants permanent injunction against Stephan Loboda, Harry Yavornitzky, Michael Yuhas, Andrew Patrick from serving as officers of the church and the defendants are to account for the assets of the church. Defendants to pay costs. Plaintiff to prepare entry.

JUDGE W. W. BADGER,
Judge, Court of Common Pleas,
Lorain County, Ohio.

APPENDIX D.

JOURNAL ENTRY OF COURT OF COMMON PLEAS OF LORAIN COUNTY.

Now come the parties herein by their attorneys and thereupon this cause came on for hearing on the pleadings and the evidence and was submitted to the Court and the Court being fully advised in the premises and on consideration thereof, the Court having filed herein its findings of fact and conclusions of law and having directed that judgment be entered in accordance therewith, the Court finds that the Plaintiffs are entitled to the relief as prayed for in their amended petition.

Now, therefore by reason of law and findings aforesaid, it is hereby ordered, adjudged and decreed that the preliminary injunction heretofore granted is made perpetual and it is hereby ordered that a permanent injunction is granted against the Reverend George Burdikoff from officiating as priest or rector of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio and that the Defendants, Stephan Loboda, Harry Yavornitzky, Michael Yuhas and Andrew Patrick and Reverend George Burdikoff and others connected with them, are hereby perpetually enjoined from serving as officers of the Church and from using or occupying said Church in said offices or any of its property or monies, and that the property, both real and personal of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio, be and hereby is restored to the Plaintiffs herein.

It is further ordered that the accounting of the assets of the Church taken by the Defendants, be continued for further hearing.

It is further ordered that the Defendant pay the costs.

APPENDIX E.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING REHEARING, JAN. 16, 1963.

It is ordered by the Court that rehearing in this case is denied.

APPENDIX F.

ORDERS OF THE SUPREME COURT OF THE STATE OF OHIO.

Order Dismissing Appeal.

This cause, here on appeal as of right from the Court of Appeals for Lorain County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiffs-appellees recover from the defendants-appellants their costs herein expended; that a mandate be sent to the Court of Appeals for Lorain County to carry this judgment into execution.

Order Overruling Motion to Certify Record.

It is ordered by the Court that this motion is overruled.

APPENDIX G.

JOINT ANSWER OF DEFENDANTS.

For answer to the amended petition the defendants admit that the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio, is a religious corporation organized under the laws of the State of Ohio, on or about March 1, 1920, under the name of "Carpatho-Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio," and that subsequently on or about January 17, 1925, said name was amended to read "The Russian Orthodox Greek Catholic St. Peter and St. Paul's Church"; admit that said Lorain Church was founded and organized for the purpose of religious worship according to the traditions and laws of the Russian Orthodox Greek Catholic Church and that in conformity therewith the clergy must have an appointment from the ruling Metropolitan of the Russian Orthodox Greek Catholic Church of North America.

Defendants deny that the Lorain, Ohio parish of the Russian Orthodox Greek Catholic Church is under the jurisdiction of a Metropolitan Leonty; deny that the individual plaintiffs are the duly elected, constituted and acting officers of the said Lorain parish, and further deny that the plaintiffs are authorized to bring this action on behalf of other members of said religious corporation.

By way of further defense to the amended petition the answering defendants say that the Russian Orthodox Church is an autocephalous member of the Eastern Orthodox Greek Catholic Church, an hierarchal Church with unquestioned paramount jurisdiction, at first in a Sacred or Holy Synod and thereafter and presently, in a Patriarch, the Supreme Church Authority of the Russian Orthodox Church; that the Russian Orthodox Church is a universal body composed of churches which worship in accordance with the doctrine, discipline and faith of the

Holy Apostolic Catholic Church of Eastern Confession as taught by the Holy Scriptures, Holy Tradition, Seven Ecumenical Councils and Holy Fathers of that Church; that as an Apostolic and Catholic Church it is not an aggregate of independent units or parishes, and, thus, a diocese or parish may not secede or become autonomous without the consent and approval of the Supreme Authority; that the American Archdiocese was founded by the Holy Synod, and was and is a constituent part of the Russian Orthodox Church, and governed directly by a ruling Metropolitan appointed by the Supreme Authority of the Church, now the Patriarch locum tenens of Moscow and all Russia and its Holy Synod; that in April of 1924 a group of Russian Orthodox Churches in America in a convention in Detroit, Michigan, resolved to become a self-governed church into an autonomous Metropolitan District with the right to elect its own Metropolitan-Archbishop; that the said Leonty alleged in the amended petition herein to be the ruling Metropolitan of the Russian Orthodox Greek Catholic Church of America was elected by the aforementioned churches which organized themselves into the Metropolitan District as such but was never appointed to that office or approved as the ruling Metropolitan or Archbishop of the Archdiocese of North America by the Patriarch, and therefore, his claim to that office is contrary to Canon Law and invalid; that the alleged "Metropolitan" Leonty, "Archbishop" John, and the "Council of Bishops" mentioned in the amended petition herein belong to the aforesaid Metropolitan District, a schismatic body, and have defected from the Russian Orthodox Church and her Archdiocese in North America; that all of the alleged prelates and their followers, priests, and laymen alike, are under suspension and interdict by his Holiness the Patriarch and the Sacred Synod of the Russian Orthodox Church.

Further answering these defendants say that the principal point or material fact whether said Leonty is the ruling hierarch or Metropolitan of the Archdiocese of North America and therefore empowered to exercise religious authority over the American churches religiously affiliated with the Russian Orthodox Church, as alleged in plaintiffs' amended petition herein, was actually and directly in issue in two former actions involving this same Church of which the Lorain Parish is a constituent part, namely *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, decided November 24, 1952, and in *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190, which issue was completely determined and finally settled by the Supreme Court of the United States in its decision of June 6, 1960, in the latter case, and therefore cannot be drawn in question in this action; that the plaintiffs who derive their authority from Leonty are now forever estopped from asserting any claim based upon his authority as alleged in the amended petition; that the Supreme Court of the United States in the aforesaid decisions determined fully and finally the facts at issue herein, and principally that the election of Leonty by the American churches of the Metropolitan District was invalid and that the appointment of the Archbishop and Metropolitan for North America by the Patriarch validly selects the ruling hierarch for the American churches; that said Leonty was referred to in the *Kedroff* case as the "schismatic head," that by reason of the aforesaid decisions of the United States Supreme Court, said Leonty and his followers are considered schismatic, and therefore without any legal authority over the priest of the Lorain parish and in matters relating to and concerning the local Lorain Church of Sts. Peter and Paul; that the ruling hierarch of the American Archdiocese in North America is Metropolitan Boris who is the accredited Archbishop by virtue of his appointment to that office

by the Patriarch, and that Dositheus Ivanchenko, his substitute, is the Bishop of New York and Acting Exarch, by like appointment; that the Lorain, Ohio parish is under the immediate jurisdiction of the Bishop of New York, Dositheus; that the defendants are obedient to the canonical authority of the Russian Orthodox Greek Catholic Church, and the defendant, Reverend George Burdikoff, is acting as the pastor of the Lorain Church with the consent, approval and by virtue of the authority vested in him by Bishop Dositheus, his immediate Superior.

Defendants further state that the same issues of law and fact were drawn in question in the aforesaid proceedings and were decided fully and finally by the Supreme Court of the United States, and are forever binding against the plaintiffs herein, and constitute estoppel as to the genuine issues raised in this action, and as to the claim of the plaintiffs in their amended petition herein.

Defendant, Reverend George Burdikoff, further says that on or about October 14, 1957, the plaintiff church duly engaged said defendant as pastor of said Lorain Church for a period of ten years thereafter by virtue of a written contract duly executed between the duly qualified and constituted officers of said parish and said defendant, and that such contract is subsisting and in full force and effect.

Further answering the defendants deny each and every allegation, averment and statement in the amended petition contained not hereinbefore specifically admitted to be true.

Wherefore, defendants pray that the amended petition be dismissed at plaintiffs' costs and that they go hence without day.

JOHN R. VINTILLA,
Attorney for Defendants.

(Verification omitted.)

APPENDIX H.

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT AND AFFIDAVIT OF REVEREND GEORGE BURDIKOFF.

Come now the defendants by John R. Vintilla, their attorney, and hereby move this Honorable Court to enter summary judgment for the defendants as provided by the newly enacted summary judgment statute, Section (2311.-04.1) 2311.041 of the Revised Code of Ohio, on the ground that the only genuine issue in the instant case is one of law; namely, whether the alleged Leonty is the ruling Metropolitan of the Russian Orthodox Greek Catholic Church of America of which the local church is a constituent part, and that said legal issue has heretofore been resolved by the United States Supreme Court in the case of *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, decided November 24, 1952, and re-affirmed in *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190, decided June 6, 1961, which involved the same church—The Russian Orthodox Greek Catholic Church—and the same legal issue—the power of Leonty to exercise religious authority as the ruling hierarch (Metropolitan) of the archdiocese of North America—as in the instant case, and, therefore, applicable and controlling in the within cause as the rule or law of the case; and that the pleadings, affidavits filed herein, including the affidavit attached hereto, show that there are no genuine issues as to any material fact, and that the defendants are entitled to a judgment as a matter of law.

JOHN R. VINTILLA,
Attorney for Defendants.

Affidavit of Reverend George Burdikoff.

Before me, the undersigned authority, on this day personally appeared Reverend George Burdikoff, who being by me duly sworn, deposes and says:

1. That he is one of the defendants in the above entitled action and makes this affidavit in support of a motion for summary judgment against the Plaintiffs.

2. That the Russian Orthodox Church in an autocephalous member of the Eastern Orthodox Greek Catholic Church, an hierarchical Church with unquestioned paramount jurisdiction, at first in a Sacred or Holy Synod and thereafter, and presently, in a Patriarch, the Supreme Church Authority of the Russian Orthodox Church.

3. That the Russian Orthodox Church is a universal body composed of churches which worship in accordance with the doctrine, discipline and faith of the Holy Apostolic Catholic Church of Eastern Confession as taught by the Holy Scriptures, Holy Tradition, Seven Ecumenical Councils and Holy Fathers of that Church.

4. That as an Apostolic and Catholic Church it is not an aggregate of independent units or parishes, and, thus, a diocese or parish may not secede or become autonomous without the consent and approval of the Supreme Authority.

5. That the American Archdiocese was founded by the Holy Synod, and was and is a constitutent part of the Mother Church, and governed directly by a ruling Metropolitan appointed by the Supreme Authority of the Church, now the Patriarch locum tenens of Moscow and all Russia and its Holy Synod.

6. That in April of 1924 a group of Russian Orthodox Churches in America in a convention in Detroit, Mich-

igan, resolved to become a self-governed church with the right to elect its own Metropolitan Archbishop into an autonomous Metropolitan District.

7. That the Metropolitan Leonty alleged in the amended petition herein to be the ruling Metropolitan of the Russian Orthodox Greek Catholic Church of America was elected by the aforementioned churches which organized themselves into the Metropolitan District as such but was never appointed to that office or approved as the ruling Metropolitan or Archbishop of the Archdiocese of North America by the Patriarch, and therefore, his claim to that office is contrary to Canon Law.

8. That the alleged "Metropolitan" Leonty, "Archbishop" John, and the "Council of Bishops" mentioned in the amended petition herein have defected from the Russian Orthodox Church and her Archdiocese in North America; that all of the alleged prelates and their followers, priests and laymen alike, are under suspension and interdict by His Holiness the Patriarch and the Sacred Synod.

9. That the Supreme Court of the United States in *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, decided on November 24, 1952, and *Kreshik v. St. Nicholas Cathedral*, 363 U. S. 190, decided June 6, 1960, determined that election of Leonty by the American Churches of the Metropolitan District was invalid and that the appointment of the Archbishop and Metropolitan for North America by the Patriarch validly selects the ruling hierarch for the American Churches; and that in the *Kedroff* case was referred to as the "schismatic head."

10. That in view thereof, Leonty and his followers are considered schismatic, and therefore without any legal authority over the Lorain parish priest and in matters re-

lating to and concerning the local Lorain Church of Sts. Peter and Paul.

11. That the ruling hierarch of the American Archdiocese in North America is Metropolitan Boris who is the accredited Archbishop by virtue of his appointment to that office by the Patriarch, and that Dositheus Ivanchenko, his substitute, is the Bishop of New York and Acting Exarch, by like appointment.

12. That the Lorain, Ohio, parish is under the immediate jurisdiction of the Bishop of New York, Dositheus.

13. That your affiant is obedient to the canonical hierarchy of the Church and is acting as the pastor of the Lorain Church with the consent, approval and by virtue of the authority vested in him by Bishop Dositheus, his immediate superior.

14. That this affidavit is submitted in support of the defendants' motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the defendants are entitled to judgment as a matter of law.

REVEREND GEORGE BURDIKOFF.

(Jurat omitted.)

APPENDIX I.

FIRST AMENDMENT.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J.

PETITION FOR INJUNCTION AND EQUITABLE RELIEF.

Now come the Plaintiffs and for their cause of action say that the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio, is a religious corporation organized under the laws of the State of Ohio, and located in the City of Lorain, Lorain County, Ohio, and under the jurisdiction of Metropolitan Leonty, and that Plaintiffs bring this action on behalf of themselves and other members of said congregation, who are too numerous to mention and that they are members and officers of the Russian Orthodox Greek Catholic St. Peter and St. Paul Church of Lorain, Ohio.

Plaintiffs say that Stephen Loboda, Harry Yavornitzky, Andrew Patrick and Michael Yuhas, as pretending officers and Rev. George Burdikoff, as pretending priest, as pretenders of said Church without proper credentials have forcibly and by devious and fraudulent means excluded the members of the congregation and officers from assuming control and operation of said church, and worshipping according to the normal statutes and By-Laws of said Church.

Plaintiffs further say that the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio, was formed for the purpose of worshipping God according to traditions and rules of the Russian Orthodox Greek Catholic Church in conformity with the existing normal statutes for Parishes of the Russian Orthodox Greek Catholic Church of America under jurisdiction of Metropolitan Leonty. That under the By-Laws of the Lorain Parish, the clergy must have an appointment by the Ruling Metropolitan of the Russian Orthodox Greek Catholic Church of America, and that the Defendant Rev. George Burdikoff was appointed to the Lorain Parish by the Ruling Metropolitan Leonty of the Russian Orthodox

Greek Catholic Church on the 15th day of July, 1955, which appointment he accepted and conducted said church according to the Statutes and By-Laws of the Russian Orthodox Church, under the jurisdiction of Metropolitan Leonty.

That thereafter, due to complaints from the local parishioners, the Metropolitan Leonty in conjunction with other Bishops of the Church ordered Rev. George Burdikoff to Mingo Junction, Ohio, on July 26, 1960, which parish the said Rev. George Burdikoff refused. Thereafter on September 20th, 1960, the said Metropoliton Leonty ordered Rev. George Burdikoff transferred to Ansonia, Connecticut, to be effective October 1, 1960, but that the said Rev. George Burdikoff, refused to comply and by reason of said insubordination, he was suspended by Archbishop John, of the Chicago Diocese, his immediate Superior, from performing any priestly duties in the Lorain Parish; that on October 25, 1960, the Council of Bishops headed by Metropolitan Leonty affirmed the suspension, and by reason thereof the said Rev. George Burdikoff, is without authority to act as Pastor and Priest of the Lorain Church.

That thereafter the said Rev. George Burdikoff in concert with the other Defendants without any authority so to do, and in violation of the rules, regulations and By-Laws governing said Church, under the jurisdiction of Metropolitan Leonty, have taken exclusive possession of said church and have attempted and are attempting to transfer said Church property, both real and personal, funds and records of the said church to the jurisdiction of Patriarch Alexis of Moscow and All Russia, and are thereby interfering with the rights of Plaintiffs and other members of said church in the control and use of the property of said Church, acording to the normal statutes and By-

Laws governing parishes. That said Defendants are attempting and will unless restrained by Order of this Court dissipate and apply to their own use the funds and property of the Plaintiff Church, and are attempting to amend the By-Laws of said church placing same under the jurisdiction of the Patriarch of Moscow and All Russia without any authority and against the wishes of the majority of the membership.

That the Defendant Rev. George Burdikoff, is not now a recognized Priest in the Russian Orthodox Greek Catholic Church of America, having been suspended by Archbishop John and the Council of Bishops, headed by Metropolitan Leonty and the said Rev. George Burdikoff does without authority, or appointment to said office unlawfully perform the duties of the Russian Orthodox Greek Catholic Priest in the Lorain Parish.

That the Defendants Stephen Loboda, Harry Yavornitzky, Andrew Patrick, and Michael Yuhas, as pretending officers of the Russian Orthodox Greek Catholic Church have without authority unlawfully employed George Burdikoff, to serve the congregation in the Capacity of Priest although they did well know or should have known that the priest must receive his appointment by the Metropolitan Leonty of the Russian Orthodox Greek Catholic Church of America.

Plaintiffs further say that all of said Defendants have expended funds and withheld the use of the Church for meetings of the congregation and for worship from these Plaintiffs and other members of the congregation, and these Plaintiffs and other members are unable to worship God according to the dictate of said Church under the jurisdiction of Metropolitan Leonty, by reason of the presence of said pretended Priest and acts of the Defendants as aforesaid and that grievous harm and irreparable injury has been done to the Plaintiffs and other members

in this case and for which there is no adequate remedy at law and if said Defendants are permitted to carry out their purported purpose of usurping the property and assets of said congregation and the said pretended priest is allowed to continue in said office and depriving the members of their rights and the said Plaintiff and members will continue to suffer irreparable injury for which they have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that the Defendants Stephen Loboda, Harry Yavornitzky, Andrew Patrick, and Michael Yuhas, may be enjoined preliminarily forthwith from permitting as said officers, said Defendant Rev. George Burdikoff, officiate as priest or rector of said congregation in said Church Building and the said Stephen Loboda, Harry Yavornitzky, Andrew Patrick, Michael Yuhas and Rev. George Burdikoff, and others connected with them may be enjoined from using or occupying said Church or any of its property or monies, and that Defendant Rev. George Burdikoff be enjoined preliminarily and on final hearing permanently from serving as a priest or rector of said Plaintiff Church in said Church building or occupying said Church building or other property of said Plaintiff Church and that the Defendants be ordered to account for all funds during their pretended office tenure, and that all of the Church property of the Plaintiff Church both real and personal be restored to the Church under the jurisdiction of Metropolitan Leonty and that any pretended changes in the By-Laws made unlawfully by the Defendants be declared null and void, and for such other and further relief as is proper and equitable and the Court can grant.

(s) BASIL DZIAMA,
M. GORDON,
J. UJHELYI,
Attorneys for Plaintiffs.

APPENDIX K.

MOTION OF DEFENDANTS TO DISSOLVE TEMPORARY INJUNCTION.

Now come the defendants and move the Court to vacate, set aside and dissolve the temporary injunction heretofore made and allowed herein, for the following reasons:

1. The petition does not state facts sufficient to justify the allowance and continuance of said temporary order of injunction.

2. The facts stated in the petition are in serious dispute and not true.

3. The facts stated in the petition are insufficient in law to warrant such emergency equitable relief.

JOHN R. VINTILLA,
Attorney for Defendants.

Affidavit of Reverend George Burdikoff.

Before me, the undersigned authority, on this day personally appeared Reverend George Burdikoff, who being by me duly sworn, deposes and says:

1. That the Russian Orthodox Greek Catholic Church is hierarchical in its form of government, and its Supreme Authority prior to 1918 was vested in a Holy Synod and thereafter in a Patriarch, who, in turn is elected by a Sobor, or general convention of the Church.

2. That the American Archdiocese was founded by the Holy Synod, and was and is a constituent part of the Mother Church, and governed directly by a bishop appointed by the Supreme Authority of the Church, now the Patriarch locum tenens of Moscow and All Russia and its Holy Synod.

3. That the Russian Church is apostolic and Catholic, that is, a universal church, and not an aggregate of inde-

pendent units or parishes, and, therefore, a diocese or parish may not secede or become autonomous without the consent or approval of the Supreme Authority, and if this is attempted, the seceding body ceases to be canonical and cuts itself off from the Church and Orthodoxy and all rights to its property.

4. That the ruling hierarch of the American Archdiocese in North America is Metropolitan Boris who is the accredited Archbishop by virtue of his appointment to that office by the Patriarch, and that Dositheus Ivanchenko, his substitute, is the Bishop of New York and Acting Exarch, by like appointment.

5. That the Lorain, Ohio, parish is under the immediate jurisdiction of the Bishop of New York, Dositheus.

6. That your affiant is obedient to the canonical hierarchy of the church and is acting as the pastor of the Lorain Church with the consent, approval and by virtue of the authority vested in him by Bishop Dositheus, his immediate superior.

7. That the alleged "Metropolitan" Leonty, "Archbishop" John, and the "Council of Bishops" mentioned in the petition herein have defected from the Russian Orthodox Church and her Archdiocese in North America; that all of the alleged prelates and their followers, priests and laymen alike, are under suspension and interdict by His Holiness the Patriarch and the Sacred Synod; that the alleged ruling "Metropolitan" Leonty has been referred to as the "schismatic head" in the case of *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94; and that by reason thereof, the above-mentioned schismatic group and their followers have no legal authority in matters relating to and concerning the local Lorain Church of Sts. Peter and Paul.

8. That your affiant, on knowledge and belief, says that the rights of the individual plaintiffs and others, as members, to enter and to worship in the local church have not been interfered with, or otherwise denied by him or others acting under his direction.

9. That the other defendants herein are the duly elected, constituted and acting officers of the Lorain Parish of the Russian Orthodox Church, and are fully accredited in office and approved as such by the Superior Authority of the church; and that to his knowledge said defendants, as officers, have not been acted against and/or validly suspended or removed.

10. That your affiant is and has been since July, 1955, the Pastor of the Lorain, Ohio, parish of the Russian Orthodox Greek Catholic Church.

REVEREND GEORGE BURDIKOFF.

(Jurat omitted.)

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No. 1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

REVEREND GEORGE BURDIKOFF, STEPHAN LOBODA, HARRY YAVORNITZKY, MICHAEL YUHAS and ANDREW PATRICK,

Petitioners,

v.

THE RUSSIAN ORTHODOX GREEK CATHOLIC ST. PETER and ST. PAUL'S CHURCH OF LORAIN, OHIO, GREGORY SANDOR, MIKE HRUBIC, MIKE CHEMEROV, MIKE KAWOLCHYK, as individuals and officers of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, LORAIN COUNTY, OHIO, NINTH JUDICIAL DISTRICT OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

RALPH MONTGOMERY ARKUSH,
Attorney for Respondents,
37 Wall Street,
New York 5, N. Y.

CHARLES H. TUTTLE
BASIL DZIAMA
MEYER GORDON
JOSEPH UJHELJI
Of Counsel

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

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OCTOBER TERM, 1962

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REVEREND GEORGE BURDIKOFF, STEPHAN LOBODA, HARRY YAVORNITZKY, MICHAEL YUHAS AND ANDREW PATRICK,

Petitioners,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, LORAIN COUNTY, OHIO, NINTH JUDICIAL DISTRICT OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion below, a copy of which is attached to the petition as Appendix A (p. 33), is reported at 117 Oh. App. 1; also 189 N. E. 2d 451.

Jurisdiction.

The orders of the Supreme Court of Ohio, refusing to review the decision of the Court of Appeals, were entered on December 19, 1962. A timely petition for rehearing was denied by the Supreme Court on January 16, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Question Presented.

Is the decision below based on adequate and independent non-federal grounds?

Statement.

The state Court of Appeals, which tried the case de novo on the same testimony and exhibits as those presented to the trial court, found the following facts (Opinion of Court of Appeals, Appendix A to petition, p. 33):

1. In April, 1924, representatives of the Russian Orthodox churches in the United States met in a convention, or sobor, in Detroit. The sobor declared itself an administratively autonomous metropolitan district, now known as the Metropolia and since 1924 accepted as the leading Russian Orthodox Church in America. It has two theological seminaries and many churches.

2. The Reverend George Burdikoff was first a priest in a group of Russian Orthodox churches known as the Anastassy Synod or Russian Church Abroad. He later switched his allegiance to the Metropolia, the ruling archbishop of which is now Metropolitan Leonty. Later again he switched his allegiance to the Patriarch of Moscow.

3. The Church of St. Peter and St. Paul in Lorain and its members were faithful followers of the Patriarch of Moscow from the time of the founding of the Lorain church in 1912 until in 1925, when they accepted the authority of the Metropolia.

4. In February, 1925, a new church building and improvements were contemplated and the church corporation filed an action to quiet title against Bishop Alexander Nemolovsky of the Russian Orthodox Church and others into whose names title to the church property had been previously transferred. The action was followed by submission to the Metropolia.

5. Since 1925 the Lorain Church and its congregation have been served by a priest who accepted the authority of the Metropolia. It sent clergy and lay delegates to functions as well as sobors of the Metropolia. The Lorain church in all things supported the Metropolia and has supported financially no other church group, except as it may have done so under the authority of the Metropolia.

6. The Reverend George Burdikoff was active in the affairs of the Metropolia and its deanery [Ohio] until in June, 1960, he secretly accepted the authority of the Patriarch of Moscow. He thereafter received appointment to the Lorain church as a priest subject to that religious prelate.

7. The Metropolia has declared itself to be an autonomous body whose doctrine, discipline and worship are those of the one Holy Catholic and Apostolic Church, as taught by Holy Scripture, Holy Tradition, the Seven Ecumenical Councils and the Holy Fathers and as kept by the Orthodox Churches of the East.

8. The Metropolia is a member of the World Council of Churches, which accepts into its membership only autonomous church bodies. The Patriarch of Moscow has brought the Russian Orthodox Church into the World Council of Churches, thereby recognizing the Metropolia as an autonomous Church.

9. For 35 years the Church [Patriarchal] which formerly claimed spiritual and temporal jurisdiction has done nothing to oust the group [Metropolia] which it calls schismatic from occupation and control of the Lorain church. It now seeks to do so by the subterfuge of a priest who has switched allegiance when it best served his personal interest.

10. When the action of The Reverend George Burdikoff became known to the congregation, complaint was made to the superior officers of the Metropolia in whose jurisdiction the Lorain church had functioned for 35 years. The Reverend George Burdikoff was ordered to move to a new parish and, upon his refusal to do so—he claiming that these former superior ecclesiastics did not now have spiritual or temporal jurisdiction over him—he was deposed as a priest of the Metropolia.

11. Bishop John of the Metropolia, with the blessing of the Metropolitan Leonty, and at the proper request of the members of the Lorain church, then ordered a congregational meeting. At this meeting the officers and trustees of the parish (respondents here) were elected. These officials and the parish corporation instituted the present action.

12. The money in banks, church money in the hands of the one who was acting as treasurer at the time of the

attempted change to allegiance of the Patriarch of Moscow, and such other church funds on hand at the time when The Reverend George Burdikoff sought to bring the church into the patriarchate, were monies contributed by those who accepted Metropolitan Leonty as their spiritual leader.

13. The real property in the instant case was used openly by those claiming the Metropolia as the church authority under which the Lorain church functioned. Title to the church lands was in the corporation, whose officers held it for the use of the Metropolia. This provision for the use and benefit of the Metropolia lasted 35 years before a challenge was made by The Reverend George Burdikoff, acting for the Patriarch of Moscow.

14. Those who accept Metropolitan Leonty and the Metropolia have expended money on the church property. They have in all things held the church out to the general public, to other church bodies and to the Patriarch of Moscow as an integral part of the autonomous Russian Orthodox Greek Catholic Church of America.

Argument.

POINT I.

The decision below is based and may be supported on adequate and independent non-federal grounds.

The basis of the decision is clearly stated by Judge Hunsicker:

> ". . . surely waiver, estoppel and laches constitute valid reasons why the Patriarch of Moscow should not now be permitted to claim spiritual jurisdiction of this church [Citing cases]". Pet. p. 40.

(In addition to the cases cited by Judge Hunsicker, see *St. Nicholas Ruthenian Ukrainian Greek Catholic Church* v. *Kapsho*, 202 Misc. [N. Y.] 893, 114 N. Y. S. 2d 27; also cf. *Ryszko* v. *Kaimakan*, 108 N. J. Eq. 34).

The application of the doctrines of waiver, estoppel and laches to the facts of this case involved no federal question. The state courts of Colorado, Virginia, Pennsylvania, New York and, inferentially, New Jersey have applied those doctrines to controversies over the use of church property.

POINT II.

The courts below had no power or right to subvert the status of the Lorain church or of the Metropolia as they have existed for nearly forty years: and, as courts of equity, they should not and could not, by sanctioning Burdikoff's clandestine and purchased treachery, participate in securing to him and the Moscow Patriarchate the rewards thereof.

(1) In *Watson* v. *Jones*, 80 U. S. (13 Wall.) 679, this Court said (p. 728):

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. * * *"

Here the Metropolia has been for nearly forty years a large, established, recognized and independent religious body with a full and continuously operating ecclesiastical organization. It is recognized by the National Council of

the Churches of Christ in the U. S. A. and by the World Council of Churches (Tr. 20, 21); and it has been for many years accepted by them as a legitimate voting member in good standing. Metropolitan Leonty has been since its inception a member of the Standing Conference of Canonical Orthodox Bishops in the Americas (Tr. 101-4).

The Metropolia has approximately 395 priests and 429 parishes and chapels and two seminaries as well as monasteries and convents (Tr. 14, 15). It has its own hierarchy and a Primate as its chief ruler. It accepts no other ecclesiastical sovereignty.*

For nearly forty years the membership and parishes of the Metropolia have been contributing to its support; new parishes have been constantly established; properties have been acquired; ecclesiastics have been elected and ordained; missionary work has been widely carried on in its name; and new adherents, many of whom are American citizens, have joined.

Under these circumstances and under the First and Fourteenth Amendments guaranteeing separation of Church and State, no civil court can now subvert the Metropolia, or outlaw its independent existence and government and hierarchs, or impose upon it another and foreign ecclesiastical ruler whom it does not recognize as such.

* Petitioners are in error in suggesting that the Metropolia since 1924 has ever acknowledged itself to be subject to the Moscow Patriarch. They refer (Pet. p. 12) to an epistle of Metropolitan Leonty stating that the Metropolia had not recognized "consecration of the Ukrainian 'Independent' autocephalous groups and the Self consecrate, recognizing only those consecrations, which were recognized by the Patriarch of Moscow and All Russia." The Ukrainian "self consecration" took place on October 10/23, 1921 (Orientalia Christiana, vol. I, 1923, p. 137, Pontifical Oriental Institute, Rome) when Tikhon was Patriarch. Since the "self consecration" took place in Russia it was natural for Leonty to follow the canonical ruling made by the head of the Church in that country.

For nearly forty years the Lorain church has been a recognized and accepted unit of the Metropolia; a member of one of its dioceses and deaneries; a subject of one of its bishops and of its Primate, and a contributor to its support. The rectors of the Parish have come to it by appointment or approval of the Metropolia's Primate (Tr. 64). Its congregations have continuously prayed for God's blessing on its bishop and Primate. Property has been acquired by it as a unit of the Metropolia and as dedicated to the religious purposes of the Metropolia.

(2) What petitioners are now demanding is that a court of equity reverse and invalidate all this history; declare it a sham and an illusion; ignore Burdikoff's own and repeated vows of allegiance, his representations of his ecclesiastical status as a priest of the Metropolia before his congregations, his colleagues in his deanery and in the Sobors of the Metropolia and to its Primate himself; disregard all the personal benefits and emoluments which he has derived thereby and therefrom; and treat the entire Metropolia as a schismatic, illegal nullity.

In effect, petitioners are calling upon a court of equity to sanction the secrecy, concealment and chicanery by which Burdikoff has sought to retain his post in Lorain notwithstanding his long-acknowledged superior's directions to take the pastorate of another parish, and to accomplish this by surreptitiously switching his allegiance and grabbing the Lorain parish as the price to be paid for his attempted subversion of it and for his own admission into another religious body.

No acute discernment is required to see that behind Burdikoff and the sudden and deft switch which was arranged for him is a scheme to attempt to seize for Moscow under guise of judicial precedent and procedure all of the

parishes and properties of the Metropolia by imposing upon them a Moscow Rule which as American institutions and citizens and in their exercise of the freedom of religion they long ago were obliged by Communist persecution of the Church in Russia to put aside. The scheme is to be advanced by enticing priests into defection and our courts into ecclesiastical obscurantisms as to heresy and schism.

(3) In 1924 when the All American Sobor met, the tie between the American Church and the Moscow Patriarchate had been broken by the Bolsheviks and the official adoption by the Communist Dictatorship of Atheism as the State creed.

As said by Judge Epstein in *St. Nicholas Cathedral* v. *Kreshik*, 9 Misc 2d (N. Y.) 1069, 1076: The Russian Church was "a tool exploited by the State".

In addition, precisely as in the case of the American Revolution, forces inherent in the current circumstances and in the great gulf between the American and the Communist ways of life, led to compulsive desires for separation and independence.

Time, the looming Communist conspiracy for world dominion, the Cold War, the arming of the Free World to protect its own survival, and the shrunken and servile state of the old Church under Communism, have accentuated this need and this movement for separation and independence.

In the second *Saint Nicholas* case, 363 U. S. 195, 191, this Court acknowledged that the New York Court of Appeals had found as a fact "the domination * * * of the Patriarch by the secular authority". It made no attempt to overrule or vacate that finding, as indeed it could not.

As long as the First Amendment stands, and Separation of Church and State is an American fundamental, no American court lawfully or physically can reverse this process,

annul this history, change the world crisis, or play the marshall to usher the Moscow Patriarch into possession of the churches, seminaries, monasteries, convents and properties of the Metropolia, and usher out the Metropolia's priesthood and people.

For the very reason that this Court held that no American court could thrust the appointees of the Church in Russia out of their forty-year possession of the Saint Nicholas Cathedral and put the Metropolia into it, the Patriarchate cannot use the American courts to thrust the Metropolia out of its forty-year possession of its churches and put the Patriarchate into them. To do so would be, as said in the first *Saint Nicholas* case, 344 U. S. 94, 119, to displace "by fiat • • • one church administrator with another".

The million communicants of the Metropolia have the right, in their constitutional exercise of the freedom of religion, to feel that now, less than ever, can they safely bow their necks to a foreign Ecclesiastic so obviously under restriction and control by an atheist foreign Power openly hostile to the freedom of themselves and of their native United States.

But even if this were otherwise, it is still fundamental American constitutional law that American courts take religious denominations as they find them; do not attempt either to take them apart or to combine them; and do not stop to listen to the cries of heresy and schism by one against another.

(4) But this whole subject is really concluded by Section 7 of Article I of the Ohio State Constitution which reads:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his con-

> sent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (See Const. 1802, Art. VIII, §§3, 25.)"

In *Hackett* v. *Hackett*, 78 OLA 485, 150 N. E. 2d 431, the court held that the force of this constitutional provision is to make observance of religious doctrine a matter of personal choice uncontrolled by law or decree of a court.

In consequence, where, under the protection of this constitutional provision, the Lorain Church and its congregation became nearly forty years ago a unit of the Metropolia and continued therein in accordance with their personal religious choice and the dictates of their own consciences, no foreign ecclesiastic can now be permitted to veto their religious freedom and to demand that they and their church become subjects of his for government from Moscow. And the same constitutional principles support the lawful entity of the Metropolia and its continuous recognized existence from 1924. No foreign ecclesiastic or jurisdiction can demand that an American court now deny religious freedom to the Metropolia and its adherents or force it or them against their own consciences to accept religious tenets, forms of worship or adherences which they have opposed.

(5) On June 25, 1962, this Court handed down a decision in the *Regents Prayer* case which still further defines the limits on the power of a State to intrude into the forbidden area of religious freedom (*Engel* v. *Vitale*, 370 U. S. 421).

The following excerpts from the opinion of the majority (Mr. Justice Black) and of Mr. Justice Douglas' concurring opinion are precisely applicable to the present case:

> "... The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate" (370 U. S. at pp. 431-2).

> "... The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic— the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests" (370 U. S. at p. 443).

Yet, in the case at bar, petitioners sought exactly contrary action by the State of Ohio through the power of its civil magistrates,—namely, state action (1) to frustrate the religious beliefs and established and religious government of hundreds of thousands of American residents and citizens who, since 1924 and for religious reasons which a "neutral state" can have no power to override, have exercised their constitutional rights to religious freedom; and (2) to strip them of the religious properties which they, their forefathers and descendants through the decades have accumulated for the practice and furtherance of their religious beliefs; and (3) to deny to them the right to con-

tinue with and under the ecclesiastical hierarchy which they have chosen and to which they have openly maintained allegiance for nearly forty years; and (4) to confirm all this substitution and seizure by having the State of Ohio lend its force through its courts in sanction and implementation of a sordid and surreptitious defection contrived or abetted by a foreign ecclesiastical regime.

In its ultimate analysis, petitioners, as self-professed agents of such foreign ecclesiastical regime, made a claim for exertion of the power of the State of Ohio through its courts which was the exact opposite and antithesis of their superiors' claim successfully made in the *Saint Nicholas Cathedral* case, that the then existing hierarchal control of the cathedral could not be displaced and superseded by exertion of the power of the State of New York either through its legislature (*Kedroff*) or through its courts (*Kreshik*).

In short, petitioners' claim called upon the Ohio courts for action through the power of the State in an Establishment of Religion far more gross than the Establishment of Religion through exertion of the power of New York stricken down by this Court in the *Regents Prayer* case.

(6) Directly in point is *Romanian Orthodox Missionary Episcopate of America* v. *Trutza*, 120 F. Supp. 183, aff'd 205 F. 2d 167, cert den. 346 U. S. 915, motion to file pet. for cert. den. 364 U. S. 809.

There, prior to World War II the Romanian Orthodox Church had established a missionary diocese in the United States to serve the spiritual needs of its adherents who had come to America. When the Russian Communist armies conquered Romania, they established a Stalinist dictatorship and took captive the native Church, which thereupon was forced to go through the form of appoint-

ing one Moldavan a supreme bishop to take over the American diocese and put out all ecclesiastics and communicants who would not submit to him. Thus the case was the reverse of the *Saint Nicholas* case. The Communist-dominated Church in Romania was trying to thrust itself into the Romanian churches in America, and they resisted.

The United States Court of Appeals upheld the right of the Romanian Church in America to *administrative independence* and to select the clergy. The Court said that this right was under constitutional protection, and that (p. 112):

> "* * * Since this is true as to protection against the interference of an individual American state, we think it should be equally true as to protection against the domination and interference of a foreign state."

We respectfully suggest that the ensuing denial of a petition for writ of certiorari (346 U. S. 915) and of a motion for leave to file a petition for writ of certiorari (364 U. S. 809) may be deemed a determination by this Court that the decisions therein below had not violated the First Amendment—particularly since the denial of that petition followed by a year the decision in the *St. Nicholas Cathedral* case, (344 U. S. 94), and also followed by two weeks the refusal of this Court to permit the defendants in that case to file a petition to mandamus the Court of Appeals of New York (346 U. S. 893) and the denial of that motion followed by four months the June 6, 1960 decision in the *St. Nicholas Cathedral* case.

The decision of the District Court, thus affirmed by the United States Court of Appeals, gave an affirmative answer to its following formulation of the issue for decision (120 F. Supp. at p. 185):

> "I repeat, all that this Court must determine is whether or not the Episcopate in the United States possessed *administrative autonomy* to elect its own bishop. * * *" (Emphasis ours.)

(7) Mr. Philip Adler, counsel for the defendants in the *St. Nicholas Cathedral Case*, cited the unreported decision of the Superior Court of California, Los Angeles County, rendered on November 29, 1948, in *Russian Orthodox Church of the Transfiguration* v. *Lisen*—a decision also referred to by Judge Epstein on the second trial of the *Saint Nicholas Cathedral Case*.

Actually, that decision, as we shall now show, is a square authority for plaintiffs in the present action.

Mr. Adler overlooked the *findings* therein on the very issue which he himself pressed upon the California court and which precisely sustain and determine respondents' side of the issue in the present case.

That California litigation was between two opposing factions in the local parish, one adhering to "The Church Abroad" (Anástassy Synod), and the other adhering to the Metropolia under Metropolitan Theophilus. The trial court determined that, for local historical reasons affecting the particular parish, the former faction had the better right to parish control; but the part of the decision which is pertinent to this action is the court's adverse ruling on the very issue which Mr. Adler sought to inject and which petitioners now seek to present here. The court stated as follows that issue (the very issue here) and also Mr. Adler's injection of it (p. 10):

> "The Moscow Administration has never been a party to this action. However, upon completion of the evidence Attorney Phil Adler, of New York, chief counsel for Archbishop Makary, came before this court, with a local firm of attorneys, and asked

> leave to appear as amicus curiae. Permission to do so was granted by the court and Mr. Adler made an argument by which he urged that the court find that neither of the parties was canonical and that all parishes of The Church in North America were subject to Archbishop Makary and Patriarch Alexy and his executive organs."

On that issue thus injected and urged by Mr. Adler (namely the very issue here present), the California trial court refused to allow Makary to intrude into the American Churches, and made the following determination and finding squarely adverse to the "Moscow Administration" and Patriarch Alexy (p. 49):

> "Purely and solely for purposes of political expediency, the communist regime within Russia has from time to time since 1917 permitted an outward form of religious organization to exist within the territory of Russia and within territory controlled by the Russian state, and an outward form of religious organization was in 1946 and is now permitted to exist within Russia, known as the so-called Patriarchal Church, headed by the so-called Patriarch Alexy, but such forms of church organization that were permitted to exist within Russia since 1917 to the present time have been and are completely under the domination and control of the communist regime."

We submit that it would be impossible to find, in so short a compass, judicial language which so perfectly fits the present case.

We also point out that Mr. Adler's aforesaid contention before the California court that "all parishes of The Church in North America were subject to Archbishop Makary and Patriarch Alexy and his executive organs" illuminates as with a lightning flash the real stake in the

instant suit,—the purpose of the Patriarchate to win a legal foothold for claiming all parishes of the Russian Orthodox Faith in America, and their vast properties.

POINT III.

Moreover, in his now professed role as an agent and representative of the Moscow regime, Burdikoff is barred by the 1925 judgment of the Court of Common Pleas quieting title in the respondent corporation as a unit of the Metropolia and as against representatives of the Moscow regime.

The Lorain church participated in the All American Sobor of 1924 (Tr. 557) and in the establishment thereat of the independent Metropolia.

In 1925 respondent corporation, then a unit of the Metropolia and under the jurisdiction of its then Metropolitan Platon, sued to quiet in itself the title to the church and its real properties which had theretofore ostensibly been conveyed by certain individuals claiming to be owners thereof to Bishop Alexander, an ecclesiastic of the Moscow regime.

The petition, answer, proofs of jurisdiction over all parties defendant and the judgment of the court are in evidence here as Pl. Ex. 3.

The judgment quieted the title in this respondent corporation; adjudicated that, at the time of the bringing of the suit, the plaintiff was in possession and the rightful owner; that the defendants were not entitled to ownership or possession; and that the individual defendants should convey to this respondent, which they did by deed filed September 2, 1925 (Pl. Ex. 18).

From that day to this neither Bishop Alexander nor any other representative of the Moscow regime ever moved in that suit to open, set aside or modify that judgment. Nor has Burdikoff, who now professes to be a representative of that regime.

What Burdikoff cannot now do directly, he cannot do by indirection. The 1925 judgment by its very nature, by its terms and by the great lapse of time, has settled against Burdikoff and any other representative of the Moscow regime the status of this respondent corporation and its properties as constituent parts of the Metropolia. As long as it stands, it is *res judicata* and an estoppel; and hence it is a bar to any action by the Ohio courts which would have the effect of turning over to Burdikoff or any other representative of the Moscow regime respondent corporation and its properties.

The law is elementary that such a judgment concludes both the issues adjudicated and also the issues which might have been pleaded and adjudicated.

The courts of law are open only to the vigilant. For nearly forty years the Patriarchate has not presented, much less pushed in the courts, any claim to the Lorain church. Its silence is the equivalent of acquiescence; and its present belated activity, only a few months old, is stale and tainted with furtiveness and artifice and with prior decades of acquiescence and laches as regards this 1925 judgment.

POINT IV.

Also the respondent corporation's title to and rightful possession of this church and its properties as units of the Metropolia are now conclusively established by nearly forty years of open possession under claim of exclusive title adverse to all the world, and by the absence of any suit by a counterclaimant within the period of limitations (Section 2305.04, Ohio Revised Code).

Burdikoff is now claiming that by his having been furtively admitted on June 21, 1960, to the Moscow Church and blessed as a priest thereof by its Dositheus, the continuous ownership and possession since 1924 by respondent corporation in its capacity as a unit of the Metropolia has vanished into thin air, and that by his own unilateral act of defection a new ecclesiastical owner has taken over and the Metropolia is ousted.

No deed to such effect exists. No vacating, surrender or abandonment by the Metropolia has ever occurred. No consent by the Primate or any judicatory of the Metropolia has ever been given, or indeed has ever been asked.

For nearly forty years the Moscow regime, if it thought it had a claim, had the physical power to voice it or to sue to make it good. For nearly forty years the Moscow regime had daily opportunity to assert that the Lorain church was in schism and under a priest and a jurisdiction which were schismatic, and hence removable by the courts at its instance as the rightful ecclesiastical claimant. But no such assertion was ever made until in 1960 the Moscow regime found that the Lorain church had a priest of the Metropolia who was willing to defect rather than obey the transfer by his

superior to another parish,—the price to be that the Moscow regime keep him at Lorain.

In other words, the Moscow regime left *abandoned* for nearly forty years the claim which it now is asserting through Burdikoff; and Burdikoff in his new role as a representative of the Moscow regime is as much barred as is his new principal itself.

A religious body may lose its property rights by laches, limitation or adverse possession (*Saint Nicholas Ruthenian Ukrainian Greek Catholic Church of Rome* v. *Kapsho*, 1952, Sup. Ct. Oneida Co., 202 N. Y. Misc. 893, 114 N. Y. S. 2d 27). In the case cited the Uniat faction in a congregation of Ukrainian descent sued in ejectment to oust the Orthodox priest and his adherents. Defendants pleaded adverse possession, limitation and laches and counterclaimed to quiet title. The referee to hear and determine dismissed the complaint, saying (202 Misc. at p. 898, 114 N. Y. S. 2d at p. 31):

> "In 1929, the episcopal authorities of the Greek Catholic Church [Uniat] abandoned control of that church and from then on failed to provide the church with supervision and pastoral care. The congregation, now represented by the present defendants, took possession of the real property as an Orthodox Catholic congregation and in doing so and from then on held it publicly in a manner hostile to the title of the plaintiff. Such holding has continued from 1929 to the time of the commencement of this action, and thus covers more than the period of the Statute of Limitations in an action to repossess real property. The claim of the Greek Catholic Church to the temporal property of this congregation is a cloud on the title and such cloud should be quieted."

Accord:

> *Greek Catholic Church of St. Michael's* v. *Archbishop Platon Roizdestvensky*, 67 Colo. 217, 184 Pac. 295, 18 A. L. R. 690;

Puckett v. *Jessee*, 195 Va. 919, 81 S. E. 2d 425;

St. Paul's Reformed Church v. *Hower*, 191 Pa. 396, 43 Atl. 221.

Here thirty-six years elapsed before any claim was made by the Moscow Church to govern the Lorain church. Metropolitan Benjamin of the Moscow patriarchate came to this country in 1933, representing the *locum tenens* of the patriarchal throne, Sergius (Tr. 628-9), but he made no attempt to seize control of the Lorain church.

An action to recover title to or *possession* of real property must be brought within twenty-one years after the cause accrued (Ohio Revised Code 2305.04). While there is no express statutory provision prescribing the requisites for title by adverse possession, the courts apply the period fixed in the Statute of Limitations (*Elder* v. *McClaskey*, 1895, CCA 6th, 70 Fed. 529).

POINT V.

Burdikoff, now claiming through and as a representative of the Moscow Church, is also barred and estopped by his long, open and professed allegiance to the Metropolia whereby he continuously secured from it pastorates, emoluments and public status; and the Moscow Church is likewise barred and estopped by its laches and failure for nearly forty years to attempt to establish any suzerainty over this parish.

A strikingly similar state of facts, having also to do with a Russian Orthodox parish, was presented in the case of *Ryszko* v. *Kaimakan*, 1931, Ct. Ch., 108 N. J. Eq. 34, 153 Atl. 651.

There the priest, who had been appointed by Metropolitan Platon, then head of the Metropolia, was trans-

ferred to another parish but, instead of obeying, attempted to switch allegiance to what is now the Anastassy Synod. He was suspended by Metropolitan Platon. Vice Chancellor Backes granted an injunction against the use of the church by the priest, saying (108 N. J. Eq. at p. 39, 153 Atl. at p. 653):

> "The church of America, divided and triple headed, has led to great bewilderment of the faithful. Platon, Kedrovsky and Apollinary each claims to be the *de jure* Metropolitan and as such each rules a part of the flock in this country. * * * Which of the three, if any, is *de jure* and the other usurpers is not within the present controversy. * * * Which of the three divines is *de jure* involves the title to the office of Metropolitan and must be litigated by the principals or decided by the legally constituted church authority, to the conclusion of the civil courts. For present purposes it is enough that the proofs show that Archbishop Platon and his diocesan council continue to function over his flock (but one church of the many, Scranton, Pennsylvania, over which he rules has withdrawn from his jurisdiction and submitted to that of Bishop Apollinary) and that he holds under color of right, if not *de jure*, at least *de facto*, the office of Metropolitan of the diocesan organization of churches [Metropolia] of which St. Nicholas is an integral part, and having appointed, had the power to remove Father Kaimakan. A member priest of his group, with a handful of parishioners, cannot, upon defection and discharge, be heard to deny his jurisdiction, and set up the denial in justification of a diversion of the organization's property to a new allegiance. Their course was to quit. It was Father Kaimakan's privilege, and that of his followers, to change masters, but not to purloin the ship; to renounce the authority to which he had committed himself, but not to thwart it. It is pretty clearly indicated that his apostacy was one

> of expediency, not conscience, subterfuge not conviction, to evade discipline. Shifting allegiance was preferable to bowing to discipline; desertion to submission. * * * If the congregation had voted secession a different question would be presented, but an arbitrary minority could not deprive the congregation of its church for divine worship under guidance of its chosen spiritual leader.
>
> The contract made by trustees of St. Nicholas Church with Reverend Kaimakan for his services for a term of years, not yet expired, is subordinate to the rules of discipline of the church and was brought to an end by the severance of pastoral relations by the church authorities. The pastor was lawfully suspended.
>
> The church remains a part of the diocesan organization presided over by Metropolitan Platon and the congregation continues under his guidance. There will be an injunction."

In the case of *Waipa* v. *Kashuara*, where the final judgment sustained the validity of an order of transfer by the head of the Metropolia in the face of attacks on the canonicity of its autonomy (N. Y. L. J. January 6, 1940, aff'd, 259 N. Y. App. Div. 843, motion for leave to appeal den. 283 N. Y. 780), the main contention of the plaintiff, a parishioner suing on behalf of the congregation, was that the defendant, a disobedient priest, was estopped from denying that he was subject to the jurisdiction of Metropolitan Theophilus by reason of the fact that by various and continued acts both as to temporal and spiritual matters concerning the church, his repeated communications with the Metropolitan recognizing his authority and jurisdiction, representations made in other legal proceedings and his conduct of the church ceremonies and liturgy. Denying a motion to dismiss the complaint, Mr. Justice Patterson said (99 N. Y. L. J. 2736, June 6, 1938):

"It is pertinent to note that Kushwara in a verified complaint in the action of Kushwara *v.* Murin recognized that he was amenable to and owed obeisance to the rules, and regulations of the Metropolitan Theophilus, wherein he alleged, that 'He was and is governed by and owes obeisance to the normal statutes for the parishes of the North American dioceses of the Russian Orthodox Greek Catholic Church [Metropolia], the Metropolitan Theophilus, the titular head of such church. * * *.' *Up to a comparatively recent period, none of the parties concerned ever raised any question as to the authority of the Metropolitan, but accepted such authority and rendered themselves amenable thereto*". [Emphasis added.]

POINT VI.

The *St. Nicholas Cathedral Case*, 344 U. S. 94, and 363 U. S. 190, is the reverse of the present case; and in no event can have any bearing here.

In the *St. Nicholas Cathedral Case* the appointees of the Church in Russia had been in physical possession and use of the Cathedral ever since 1905 and had continued in such possession down to the present day. Such possession began with the appointees of the Most Holy Synod, then the appointee of Patriarch Tikhon, then one John S. Kedrovsky claiming as Archbishop appointed by Moscow and continued thereafter through a succession of Moscow appointees to the present. The narrative is told in detail in 302 N. Y. 1, 96 N. E. 2d 56; 306 N. Y. 38, 114 N. E. 2d 197; 7 N Y 2d 191, 164 N. E. 2d 687; 344 U. S. 94.

Not until April, 1945, did the Metropolia (Metropolitan Theophilus Pashkovsky) institute an ejectment suit to oust the Moscow regime from the Cathedral; and at no time thereafter did the Metropolia or its Metropolitans succeed

in securing possession. This Court held that, inasmuch as the Mother Church was in continuous possession and operation of the Cathedral, it could not be ousted therefrom and control over it transferred to another religious organization either by fiat of the New York legislature or by exercise of state power by the New York courts.

As said by Mr. Justice Frankfurter in his concurring opinion (344 U. S. 94, 121):

> ". . . St. Nicholas Cathedral is not just a piece of real estate. . . . A cathedral is the seat and center of ecclesiastical authority. . . ."

In short, the Cathedral was under physical administration by the ecclesiastical authority of the Moscow regime; and, as said by Mr. Justice Reed (p. 119), there was no power in the legislature to displace "one church administrator with another" or to pass "the control of matters ecclesiastical from one church authority to another".

But here the situation is the reverse. Here it is the Moscow regime which is seeking to oust and to terminate an ecclesiastical authority which has been in one continuous possession and control, adverse to all the world, for nearly forty years.

POINT VII.

Even if, contrary to the foregoing principles, the Court should find occasion to examine the canonicity of the Metropolia, it is not bound by anything in the *Kreshik* case to outlaw the Metropolia.

The case at bar is as different from *Kreshik* v. *St. Nicholas Cathedral*, 363 U. S. 190 (decided a few days before Burdikoff defected in June 1960) as day is from night.

1. In the *Kreshik* case, the representatives of the independent Metropolia sought by ejectment to oust the representatives of the Moscow patriarchate from the New York Cathedral, whereas here a renegade priest is seeking to subvert the Lorain church from the Metropolia and to subject it instead to the Moscow patriarchate.

2. Respondents here, adherents of the Metropolia, are in possession of the Lorain church by virtue of a decree of a court in 1925 quieting title in their favor and by open, public and constant use for some forty years. In the *Kreshik* case, on the other hand, it was the representatives of the Moscow Church who held continuous possession of the cathedral under a judgment of many years standing.

3. Saint Nicholas Cathedral was appointed to be the central see of the Russian Orthodox Church in America. Its construction had been financed largely by contributions from Russia. The Lorain church, on the contrary, was constructed entirely with funds raised by the local congregation. Not a penny came from Russia (Tr. 434; 437).

4. Thus it was one thing for this Court to hold that, irrespective of the fact that it was communist dominated and controlled, the Moscow patriarchate was nevertheless entitled to continue in the use and possession of Saint Nicholas Cathedral which was built for its benefit as a "shelter" for the appointee of the Church in Russia. It is quite another matter to hold here that this apostatizing priest may flout an order of a court quieting title in these respondents of some forty years standing and turn this church, built by the local congregation for their worship, over to the control of the soviet-dominated Moscow patriarchate in defiance of the wishes of 90% of the congregation.

If petitioners' position were correct, there would be nothing to prevent the Moscow patriarchate from wresting control of every Russian Orthodox parish and pulpit in the United States from loyal American hands and turning each of the 420 churches and chapels of the Metropolia into a lethal transmission belt for soviet propaganda.

In the *Saint Nicholas Cathedral* case, this Court did not, for it could not, reverse the finding of the New York Court of Appeals (7 NY 2d 191, 204, 164 N. E. 2d 687, 693):

> "... that the domination of the Patriarchate by the Communist government, and the necessary subservience of the church in Russia to the Soviet State have been conclusively proved and confirmed. ..."

This Court did hold that such domination and subservience were immaterial because, to quote the New York Court of Appeals (7 NY 2d at p. 205, 164 N. E. 2d at p. 693):

> "No one disputes that, prior to any time of trouble or dissension, St. Nicholas Cathedral had been dedicated as the See of the North American Diocese of the Russian Orthodox Church and was to be used and controlled by the Archbishop of the diocese who was in turn appointed by and subject to the Holy Synods ... or, in 1918, the Patriarch of Moscow".

To reiterate, this Court held that the Patriarch of Moscow was entitled to the continued use and occupancy of the Cathedral which had been dedicated to the benefit of the appointee of the Church in Russia and for decades had housed such appointee, regardless of whether the patriarchate was under the soviet thumb. Here, however, the representatives of the Moscow patriarchate seek to wrest this Church from its faithful for whose use and benefit it was dedicated as their House of Worship.

POINT VIII.

Respondents are not estopped by the *Saint Nicholas Cathedral Case.*

Petitioners invoke the doctrine of "collateral estoppel" in an attempt to set up the judgment in the New York case as a bar to this action.

But not only, as has been indicated, was that case the reverse of this, in that there appointees of the Church in Russia had been in possession of the premises for over forty years, and that case presented none of the defenses to Moscow's claim that are here presented viz., *res judicata*, limitations, laches, estoppel, adverse possession and clean hands, but the parties were different.

Petitioners would have the Court believe that the case at bar is a contest between Metropolitan Leonty and the Moscow Patriarch, their respective agents and privies. This oversimplification is not supported by the record. Respondents are the parish corporation and the duly elected committee (parish council) suing on behalf of the congregation. While it is true that respondents are loyal adherents of their Metropolitan, they and the class which they represent have rights and defenses in this suit that are personal to them and not to the Metropolitan. For example, it is respondents and their forbears, not the Metropolitan, who built, embellished and maintained the Lorain church throughout the years. It was respondent corporation, not the Metropolitan, which brought the suit to quiet title in 1925 and obtained judgment against the Moscow appointee. It was the congregation, not the Metropolitan, which contributed annually to the support of the Metropolia. It was the congregation, not the Metropolitan, which paid petitioner Burdikoff a salary, and gave him the use of the

rectory, in reliance on his representation that he was a priest of the Metropolia, loyal to its hierarchy and organic statute.

On the other hand, there are defenses to the claim of petitioners which, conceivably, might not be available against the Patriarch e.g. estoppel and clean hands.

Furthermore, new facts have appeared which were not before this Court in the *Saint Nicholas Cathedral* case. One of the most important of these is the admission of the Moscow Church to the World Council. In the words of Judge Hunsicker (Pet. p. 36):

> "... The Patriarch of Moscow has brought the Russian Orthodox Church into the World Council of Churches, thereby recognizing the Metropolia as an autonomous church."

This fact alone would prevent the operation of the "collateral estoppel" invoked by petitioners.

POINT IX.

The St. Nicholas Cathedral decisions are authorities for, not against, respondents' position.

In the *Kedroff* decision (344 U. S. 94) this Court held §§105 and 107 of Article 5-C of the Religious Corporations Law of the State of New York (50 McKinney's N. Y. Laws), as applied to the use and occupancy of Saint Nicholas Cathedral, to be invalid. Mr. Justice Reed said (344 U. S. at p. 119):

> "... By fiat it [Article 5-C] displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit

> of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment. . . ."

In the *Kreshik* decision (363 U. S. 190) the Court said (at p. 191):

> ". . . the decision now under review [7 NY 2d 191, 164 N. E. 2d 687] rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff*. . . . our ruling in *Kedroff* is controlling here, and requires dismissal of the complaint."

Mr. Justice Reed's language above quoted is exactly applicable to the case at bar. Petitioners would have the State of Ohio, through its judicial branch, displace the Metropolia, which for thirty-eight years has governed the Lorain church, with the Moscow patriarchate. By so doing the State of Ohio would pass "the control of matters strictly ecclesiastical from one church authority to another" and thus intrude "for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom".

Both the federal and the Ohio constitutions forbid such intrusion.

POINT X.

Respondents' entire "argument" is open acknowledgment of their real objective in this suit, namely, to seek a ruling which could be used to oust the entire Metropolia from *all* its parishes, seminaries and properties, and to transfer possession and authority to the Moscow Patriarchate with power to dispossess by court decree and by ecclesiastical excommunication hundreds of thousands of Americans who for two generations have worshipped under, and enlarged by their means, the Metropolia.

(1) In short, they are asking this Court to make the First Amendment and the Ohio constitution and the *Saint Nicholas Cathedral Case operate in reverse*, and become lethal weapons for ousting and destroying an entire fully organized and [illegible]anding American religious establishment, and for capturing its pulpits, its multitudinous communicants and its properties worth many millions of dollars, notwithstanding that denomination's nationwide recognized status and its accepted membership in the National Council of Churches, the World Council of Churches and the Standing Conference of Canonical Orthodox Bishops in the Americas.

(2) Of this dominant objective petitioners and the Moscow regime operating through them make no secret. Their petition repeatedly puts it baldly (p. 17):

> "... The determination of the right to use and occupy the Lorain parish depends upon whether Leonty or Dositheus is the ruling hierarch for the American churches."

Again, their petition describes the issue as (pp. 17-18):

> ". . . whether Leonty, who was elected to his ecclesiastical office by a sobor of the American churches, or the appointee of the Patriarch of Moscow, is the ruling hierarch for the American churches. The instant case and the *Kedroff* and *Kreshik* cases involve the identical question as to who is entitled to the use and occupancy of a church of the Russian Orthodox denomination as between disputants who are adherents of such faith."

Obviously, if these claims were expressly or impliedly upheld by American courts, the Patriarchate in Moscow could appoint ecclesiastics and other deputies to take over every parish and institution of this American denomination, and excommunicate every one who resisted, and seize for Moscow *as the great prize* all that denomination's properties and all of its pulpits throughout the length and breadth of the United States.

(3) In the only other instances where, under comparable circumstances, such a monstrous attempt at expropriation of an entire denomination and all its property by a foreign ecclesiastical aspirant has come before our American courts, it was summarily slapped down,—*Romanian Orthodox Episcopate of America* v. *Trutza*, 120 F. Supp. 183; aff'd 205 F. 2d 107; cert. den. 346 U. S. 915, motion to file pet. for cert. den. 364 U. S. 809; and *Russian Orthodox Church of the Transfiguration* v. *Lisen*, an unreported decision by the Superior Court of California (*supra*, pp. 15-17).

(4) The fact is inescapable, and has been affirmed by all three branches of the American government, that in Russia religious freedom does not exist in the sense in which American citizens have a constitutional right to believe in

religious freedom and to create their own religious establishments.

See, for example, the explicit findings of Congress in the National Security Act (50 U. S. C. A. §§781, Sec. 2(1) and (2) which only in June, 1960 were made the basis of the decisions in *Communist Party* v. *Control Board*, 367 U. S. 1, 4, 5; *Scales* v. *United States*, 367 U. S. 203).

See also the judicial determinations in the *Kreshik* case itself that the Moscow regime was a "tool exploited by the State", and that the atheistic Communist Dictatorship imposed "the domination of the Patriarch by the secular power".

Indeed, these facts were and are of such everyday knowledge and public record since the Bolshevik Revolution, that judicial notice thereof is easily justifiable.

Furthermore, when in 1924 the All American Sobor met, the former tie between the American Church and the Moscow Patriarchate had been openly and effectively broken by the atheist State. The Patriarch himself had been imprisoned; and in 1925 the Patriarchate itself was abolished and remained so for twenty years.

(5) To deny, as does the petition, that the American Church then had the right to believe that independence was necessary to its own preservation and religious freedom is to deny the First Amendment itself and to assert that the American Church had no alternative to disintegration in confusion and chaos.

To save itself and to assure its future from what it had the right to believe would be open or hidden domination or encroachment by an atheist Communist Dictatorship seeking world-overlordship, the American Church did exactly what the Russian Church itself did in 1448 when the Turks were besieging Constantinople, the then seat of East-

ern Orthodoxy,—it declared and organized and ever since has maintained it own independence and organization (Columbia Encyclopedia [1946 ed.] p. 1314; and *St. Nicholas Cathedral* v. *Kedroff*, 276 App. Div. 309, 341-2).

(6) Surely, under the First and Fourteenth Amendments, the descendants of the body of communicants who thus organized an independent religious establishment in 1924 *also* have a continuing constitutional right to believe, precisely as American public opinion itself believes, that the Communist Totalitarianism in Russia incorporates all within its grasp into its own monolithic dominion, requires subservience to its internal and external policies, and promotes atheism and materialism as its official "religion".

Surely also, the two generations of Americans which have followed the 1924 Founders, have a right under the First and Fourteenth Amendments to continue to believe that the secular dominion over the Moscow religious regime still continues, and that in furtherance of its political purposes it could and would be used in this country to extend its sway over any American Church governed from Moscow.

The right to freedom of religious belief includes the right to reject a religious organization believed not to be free.

Americans have a constitutional right to fashion a religious establishment which is assuredly free rather than to be forced into one which is suspect. Otherwise the First Amendment is meaningless.

(7) Hence, all the elaborate discussion in the petition about "schism" and "canonicity" and the artful play upon the words "Russian Orthodox", are merely disguised ways of attempting to deny to about a million Americans their constitutional right to freedom of opinion, religious belief, worship and organization of a religious establishment. It

is more. It is an attempt to seize all the religious property which the communicants of this American Church have accumulated for the last forty years.

The Moscow regime cannot use its slogans of "schism" and "canonicity" to override in this country the First Amendment or to commingle Church and State. For this reason, this Court said in the *Watson* case, 80 U. S. (13 Wall.) 679, 728:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

(8) Russian Orthodox Greek Catholic Church of America (Metropolia) is a distinctive name. It is altogether different from "the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church".

The Metropolia came into being with a Metropolitan as its head at the All American Sobor in 1924. As such it is recognized throughout the United States and by the National and World Councils of Churches for all denominational, ecclesiastical and property purposes.

(9) In sum, the real issue here is whether in the face of constitutional guarantees of freedom of religious belief, worship and organization, American courts will so accept a cry of "schism" from Moscow as to put under the yoke of a foreign ecclesiastic an American religious body of forty years existence, with nearly a million communicants and with properties worth millions.

To do so even impliedly or by inference would, we say again, cause the Constitution and the *Kreshik* case itself to negate themselves.

The Moscow Patriarchate is, of course, free to have its own denomination in the United States and to conduct it within the restrictions of our Security Laws.

Conclusion.

Petitioners are attempting to cause the First Amendment to the Constitution of the United States and the corresponding section of the Ohio Constitution to work in reverse. Namely, to force our courts to disestablish an autonomous ecclesiastical organization established and recognized for nearly forty years and then to turn over all it has, including priesthood, to a foreign, alien ecclesiastical regime, contrary to the rights and wishes of the American constituency. We further maintain that waiver, laches, estoppel and adverse possession conclusively called for the judgment below.

For the foregoing reasons the petition should be denied.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Attorney for Respondents.

CHARLES H. TUTTLE
BASIL DZIAMA
MEYER GORDON
JOSEPH UJHELJI
Of Counsel